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**REPORTS OF CASES**

HEARD AND DETERMINED IN THE

**APPELLATE DIVISION**

OF THE

**S U P R E M E C O U R T**

OF THE

**STATE OF NEW YORK.**

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**MARCUS T. HUN, REPORTER.**  

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**VOLUME XXXIV.**

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OF

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\* Died October 10, 1898.

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The attention of the profession is called to the fact that the Court of Appeals in many cases decide an appeal upon other grounds than those stated in the opinion of the court below.

The affirmance or reversal of the judgment of the Appellate Division does not necessarily show that the Court of Appeals concurred in, or dissented from, the statements contained in the opinion of the Supreme Court. (*Rogers v. Decker*, 131 N. Y. 490.)—[REP.]

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# Cases

DETERMINED IN THE

## SECOND DEPARTMENT

IN THE

### APPELLATE DIVISION,

October, 1898.\*

---

JOHN B. LORETZ, Respondent, v. METROPOLITAN STREET RAILWAY  
COMPANY, Appellant.

*Venue laid in a county in which neither party resided — on defendant's motion to change to the county of his residence it should not be changed to that of the plaintiff.*

On a motion by a defendant to change to the county in which he resides the venue of an action which has been laid in a county in which neither of the parties thereto resides, it is improper for the court to make an order, against the objection of the defendant's counsel, changing the place of trial to the county of the plaintiff's residence.

APPEAL by the defendant, the Metropolitan Street Railway Company, from an order of the Supreme Court, made at Kings County Special Term and entered in the office of the clerk of the county of Queens on the 12th day of August, 1898, changing the place of trial of the action from the county of Queens to the county of Kings.

*Charles R. La Rue*, for the appellant.

*Arthur C. Coffey*, for the respondent.

WILLARD BARTLETT, J.:

The plaintiff laid the venue of this action in Queens county, although he resided in Kings county, and the defendant corporation

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\* The other cases of this term will be found in volume 33 App. Div.—[REP.]

had its place of business and carried on business exclusively in the county of New York. The defendant made the necessary demand that the place of trial be changed to New York as the proper county, on the ground that neither of the parties resided in Queens; and upon the plaintiff's neglect to comply with the demand applied to the court to have the venue changed accordingly. The learned judge at Special Term denied the defendant's motion and made an order, against the wish of defendant's counsel, changing the place of trial to the county of Kings.

We have concluded that this order ought not to be allowed to stand. At the outset, the plaintiff had his choice as between the two proper counties in which to bring his action. These were Kings county, where he resided, and New York county, of which the defendant corporation was constructively a resident. The plaintiff chose to lay the venue in Queens county where it did not belong. The defendant then exercised the statutory right of demanding and moving that the place of trial be changed to New York as the proper county. The plaintiff should not be allowed to defeat this application by now consenting to try the case in the county where he lives. He elected not to try it there when he designated Queens county as the place of trial, and he should be held bound by that election, after the defendant has taken steps to have the venue changed to one of the two proper counties prescribed by the statute. Such was the rule applied in *Rector v. Ridgwood Ice Co.* (38 Hun, 293) where a plaintiff, who had laid the venue in a county in which neither party resided, was not permitted to change it to the county in which he lived by amending the summons and complaint, after the defendant corporation had given notice of a motion for a change to the county in which that corporation was located.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs.

All concurred.

Order reversed, with ten dollars costs and disbursements, and defendant's motion granted, with ten dollars costs.

FLORA L. RAY, Respondent, v. THE NEW YORK BAY EXTENSION  
RAILROAD COMPANY, Appellant.

*Judgment — a modification thereof is not obtainable by order — when an easement in, and not the fee of, a street is conveyed — it may be acquired by eminent domain.*

34	3
158	702
34	3
39	595
34	3
48	503

After a judgment has been entered in an action, deciding that the plaintiff therein is the owner of certain lands within the boundary of an avenue, and that she also possesses an easement therein of access to and from her premises, in front of which a railroad embankment has been constructed, and directing the railroad company, the defendant in the action, to take proceedings to condemn, the court has no power to grant an application to open, amend and correct the judgment so as to show that the plaintiff owned no part of the land within the bounds of the avenue, but only an easement therein.

*Semble*, that a grantee, under a conveyance which bounds the land conveyed upon the exterior line of an avenue, not then existing, but thereafter to be opened, and which contains a covenant that the avenue shall be opened as a street bounding the premises conveyed, and that the grantee, his heirs and assigns, "may enjoy the privilege of using the same as such forever," obtains only an easement in the avenue.

Such easement constitutes a property right, which is subject to proceedings for condemnation *in invitum*.

APPEAL by the defendant, The New York Bay Extension Railroad Company, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 3d day of May, 1898, denying the defendant's motion to open and correct the judgment entered therein.

*William J. Kelly*, for the appellant.

*M. E. Harby* [ *Walter S. Logan* with him on the brief ], for the respondent.

HATCH, J. :

The findings and the judgment in this action seem to conclusively settle that the plaintiff is the owner of some land within the boundary of Cedar avenue, and also that she possesses an easement therein, giving a right of access to and from her premises, in front of which the embankment has been constructed and over which the defendant operates its railroad. This right of the plaintiff, in and to this street, the judgment directs the defendant to take proceedings to

condemn. The application to the court upon this motion was to have the judgment opened, amended and corrected, so as to show that the plaintiff owned no part of the land within the bounds of Cedar avenue, but had only an easement therein. This motion the court denied, upon the ground of want of power; and in this we think it was correct within the authority cited by it. (*Heath v. N. Y. Building Loan Banking Co.*, 146 N. Y. 260.) The change of determination that the right of the plaintiff was not a fee but only an easement, would be quite as radical as was the reduction made in the amount of the judgment in the foregoing case. We agree with the learned counsel for the appellant that the description contained in plaintiff's deed and in the deeds of her predecessors in title, did not convey to her any part of the fee in Cedar avenue. The conveyance to Ransom, through whom the plaintiff obtained title, bounded the land upon the exterior line of Cedar avenue, not then existing, but thereafter to be opened. The deed, also, contained a covenant that Cedar avenue should be opened as a street sixty feet wide, bounding the premises conveyed, and the grantee, his heirs and assigns, "may enjoy the privilege of using the same as such forever." This language seems to show an intent upon the part of the grantor to limit the conveyance to an easement. The case, therefore, in principle, falls within the decisions in *White's Bank of Buffalo v. Nichols* (64 N. Y. 65); *English v. Brennan* (60 id. 609); and outside the principle in *Bissell v. New York Central R. R. Co.* (23 id. 61); *Matter of Ladue* (118 id. 213). The judgment, however, is presently conclusive upon this question. The defendant was not without remedy; it could have appealed from the judgment, and availed itself of this point. Not having done so, it cannot now be heard to complain. There seems to rest in the mind of the appellant the idea that it cannot comply with this judgment, as the only property it can describe as belonging to the plaintiff is an easement in the street. There is little difficulty in describing the land embraced within the street, and whether in fact the plaintiff possesses an easement or a fee, it remains established that she has a property right. This property right is the subject of proceedings *in invitum*.

It is, however, contended, that if the right be only an easement, the plaintiff has no interest which is the subject of condemnation; that her property right is limited to that of passage and means of

access, which being furnished, is all that can be demanded, even though the same be changed by the change of grade. Upon this subject appellant invokes the rule laid down in *Conklin v. N. Y., Ont. & W. Ry. Co.* (102 N. Y. 107), and *Rauenstein v. N. Y., L. & W. R. Co.* (136 id. 528). These cases presented the question of the rights of an abutter to an easement in common with the general public. Under such circumstances it was held that a change of grade of a street by a railroad company, acting under a general statute, or by the direction of municipal authority, took from an abutting owner no property right, even though it worked inconvenience to such owner in the use of the street. Such, however, is not the present case. This plaintiff has an easement in the street quite independent of any public right. Indeed, it does not appear that the public has any interest therein. In any event it is secured to plaintiff by a grant, and in this grant the public have no interest. This is a property right of which she may not be deprived, and which she may insist shall remain unimpaired by any authority, public or private. It is indestructible, and she may insist upon the sancity of its preservation to the fullest extent to which she may insist upon any other property right in land. (*Holloway v. Southmayd*, 139 N. Y. 390; *Lord v. Atkins*, 138 id. 184; *Cunningham v. Fitzgerald*, Id. 165.) If, therefore, we assume that the property right rests only in an easement, still, as such easement represents a private property right, it becomes subject to a proceeding for its condemnation. In any view, therefore, the defendant would be required to extinguish this right before it can lawfully enter upon the property.

The order should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

34	6
158a	204
158a	218
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34	6
41	458
Vol. 34.	
App. Div.	
34	6
44	451
34	6
80	545

THE PEOPLE OF THE STATE OF NEW YORK ex rel. AUGUSTUS C. TATE, Appellant, v. WILLIAM DALTON, Commissioner of Water Supply of the City of New York, Respondent.

*A veteran a subordinate officer in Brooklyn — not removable at pleasure by the officer of the city of Greater New York under whose direction he is after the consolidation — his remedy to prevent removal.*

A veteran of the civil war, a subordinate public officer of the city of Brooklyn, not vested by statutory enactment with the performance of any independent duties, who continues to discharge his duties after the taking effect of the Greater New York charter in a subordinate position under the commissioner of water supply of the city of New York, is not subject to removal at the pleasure of the commissioner under section 1536 of the charter.

The remedy of such veteran, in case of his summary removal from his position by the commissioner of water supply, and the position being filled by another incumbent, is not by mandamus, but by an action of quo warranto for his restoration to his office, his remedy being determined by the fact that he is a public officer and not by the fact that he is not an independent officer.

APPEAL by the relator, Augustus C. Tate, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 7th day of June, 1898, denying the relator's motion for a peremptory writ of mandamus directed to William Dalton, commissioner of water supply of the city of New York, commanding him to reinstate the relator in the position of water registrar for the department of water supply in the borough of Brooklyn.

*Joseph A. Burr*, for the appellant.

*Almet F. Jenks* [ *William J. Carr* with him on the brief ], for the respondent.

HATCH, J.:

The relator was appointed to the office of water registrar of the city of Brooklyn on the 1st day of February, 1894, by the then commissioner of city works of such city. He immediately entered upon and continued to discharge the duties of such office until the cities of New York and Brooklyn were consolidated pursuant to chapter 378 of the Laws of 1897. After consolidation the relator continued to discharge the same duties that he had previously performed, in the office of the commissioner of water supply of

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the city of New York, until the 8th day of April, 1898, when he was summarily removed from his office by the commissioner of water supply.

The provision of law existing at the time of the relator's appointment authorized the commissioner of city works to "appoint, during pleasure, \* \* \* a water register, \* \* \* and such and so many other subordinate officers and employes as the water service may require." (Chap. 583, Laws of 1888, tit. XV, § 1.) By section 2 of this title bureaus in the department of city works were established, "the chief officers, subordinates and employees of which shall be appointed and removed at pleasure by the commissioner of city works," as provided by section 2 of title 3 of the act. By the last section power was also conferred upon the commissioner to fix the salaries. By section 2 of title XV, subdivision 3, a bureau for the collection of revenue arising from the sale of water was established, "the chief officer of which shall be called the 'water registrar.'" The registrar was made subject to the provisions of the 5th section of title VII of the act, which made the conversion of public moneys a felony.

There does not appear to have been any statutory regulation prescribing the duties of the water registrar, but he seems to have been subject to the direction and control of the commissioner of city works. The revenue from the sale of water, while paid into the bureau of which the registrar was the chief officer, was nevertheless regarded as having been paid to, and collected by, the department of city works, and was required to be paid over daily. (Id. § 4, tit. XV.) There is no mention of any specific statutory duty devolved upon the registrar, and we can find nothing which invested him with any authority independent of the commissioner of city works. The provisions of the Greater New York charter (Laws of 1897, chap. 378) created a department called "Department of Water Supply," the head of which was called the "Commissioner of Water Supply." (Id. § 468.) By section 451 the main office of the department was required to be in the borough of Manhattan, unless the board of public improvements should otherwise determine. The commissioner of water supply was authorized to establish branch offices in such other boroughs as he might deem advisable, and by subdivision 3 of section 469, such



commissioner was given jurisdiction over the collection of the revenues from the sale or use of water from the public water supply. By section 1536 was provided a scheme for the transference and assignment to duty of the subordinates of the department of city works of the city of Brooklyn, and others, into the public service of the consolidated city. In pursuance of the authority contained in the Greater New York charter, the commissioner of water supply established a branch office in the borough of Brooklyn in which is a position in all respects similar to the position of water registrar as it formerly existed under the department of city works of the city of Brooklyn. We are, therefore, confronted with a case in all essential respects similar to the one presented in *People ex rel. Brymer v. Gray* (32 App. Div. 458). The views therein announced must control the determination in this case so far as the right of the relator rests upon authority to be transferred, and the existence of a similar position into which he might enter. Both rights are preserved to him by the provisions of the charter and the action of the authorities thereunder. So far as there is difference between this and the *Brymer* case, it cannot operate to change the principle of construction. All of the provisions of the charter sought to accomplish the same end; the difference is in the character of the office, and this works no change in result. The effect of section 1536 of the charter was the subject of examination in *People ex rel. Percival v. Cram* (32 App. Div. 414), and supports the conclusion at which we have arrived upon this question.

We may assume that the relator was a public officer. He was so named in the act which created the office that he filled, and we think he might have been indicted for malfeasance in office if probably guilty of any criminal offense therein. At the same time he was a subordinate officer, subject to the control of the commissioner of city works of the city of Brooklyn, and was not vested with the performance of any independent duties by statutory enactment. He was wholly subject to the direction and control of the commissioner of city works, and occupied in this respect a similar position to that occupied by the relator in the *Brymer* case. That he was a subordinate is recognized in the charter of the city of Brooklyn, to which we have already adverted. That the position continued to be a subordinate position to the commissioner of water supply is

established by the Greater New York charter; and the occupant of it is recognized by the commissioner of water supply as a subordinate, as appears from his affidavit filed in answer to this application. The relator is, therefore, protected in his right to transfer, and in his occupancy of the similar position under the Greater New York charter, within our former decisions. Nothing in *People ex rel. Earl v. England* (16 App. Div. 97) conflicts with this view. In that case the Police Court clerk was held to be an independent officer. This was clearly manifest by the character of his duties. Not only did he perform duties by the direction of the police justice, but he performed duties in his absence under a command laid upon him by the statute. The act required the clerk to collect and pay into the city treasury all fees, fines and penalties, keep a docket of the cases, and adjourn pending cases in the absence of the justice. These duties were quite independent of the justice, and were not subject to his direction or control. The same is true also of the officer in *Matter of Hardy* (17 Misc. Rep. 667). He was required to take an oath of office, care for the public buildings, appoint an assistant and provide for repair and cleaning. While subject to a written direction of the mayor as to the repair, care and cleaning, and to his approval in the appointment of an assistant, yet the duties he performed were under the provision of the statute and were independent in character. The case did not raise the point of what constituted a subordinate officer under the provisions of law we have considered. *People ex rel. Sears v. Tobey* (8 App. Div. 468) presented the question of an independent officer, and may, therefore, be dismissed. That the relator was a public officer does not, therefore, control the question, as he was still a subordinate officer, of such a character that his right to the position was preserved under the sections of the charter we have considered.

Section 1536 of the charter reserved the right in the commissioner of water supply to remove at pleasure. But we stand committed to the doctrine that officers protected by the veteran statutes, so called, are excepted from such provision, and that the relator is so protected. Where the officer or employee is not an independent officer, and belongs to a general class to which the acts apply, the exception applies, and the construction must be

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that the power to remove at pleasure does not apply to such persons. We have noted some exceptions to this rule, and there may be others which may develop, based upon particular facts. Our recent discussions call for nothing further upon this point. (*People ex rel. Speight v. Coler*, 31 App. Div. 523; *People ex rel. Brymer v. Gray*, 32 id. 458.) Under our decision in the *Earl Case* (*supra*) and in the *Speight Case* (*supra*) we held that the local Veteran Act, applicable to the city of Brooklyn, remained unrepealed; therefore, the question whether the position held by the relator is confidential or not (upon which question we express no opinion) is of no consequence, as the act makes no exception in favor of such positions.

But while we reach the conclusion that the relator is entitled upon this record to the office, we also reach the conclusion that the remedy for his restoration is not by mandamus, but resort must be had to an action for that purpose. We do not regard the fact that the relator is not an independent officer as the test. The test is, is he a public officer; and upon that point we think the decision in *People ex rel. Wren v. Goetting* (133 N. Y. 569) is controlling. In *People ex rel. Drake v. Sutton* (88 Hun, 173) the relators were mere employees not holding a public office. The present office is filled by another incumbent, and he is entitled to be heard. The remedy is by quo warranto, where the title may be tried.

It follows that the order must be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

THOMAS F. PENNY, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

*False imprisonment — a railroad company is not bound by an unauthorized arrest, made in its station, of one not a passenger — what acts of a railroad "detective," towards a person already arrested, are not within the scope of his employment.*

In an action brought to recover damages for an alleged illegal arrest and imprisonment of the plaintiff at a station of the defendant's railroad, there was no evidence that the plaintiff had purchased, or was in possession of, a railroad ticket entitling him to ride on the defendant's road, or that he was entitled to

34	10
56	208
34	10
60	437

ride thereon, or that he stood in the relation of a passenger to the defendant, and it appeared that the persons who made the arrest and who guarded plaintiff's place of imprisonment and forcibly detained him were not employees of the defendant, and it did not appear that any persons acting for the defendant were directed to arrest or detain the plaintiff, although a person employed by the defendant as a detective, and subject to directions by its law department, entered the place where the plaintiff was confined after his arrest, searched his clothing, committed some indignities upon his person, and applied to him abusive language, without, so far as appears, any direction having been given the detective to arrest the plaintiff or to do the acts which he did after the plaintiff was arrested.

*Held*, that there is no such settled significance to the term "detective" as of necessity imports authority to arrest criminals or persons charged or suspected of committing criminal acts, and that, in order to establish such authority, it is essential that evidence of such conditions as warrant the inference of its existence shall be given;

That there was not sufficient evidence in this case to warrant a submission to the jury of the question whether the detective did or did not act within the scope of his authority.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Orange on the 15th day of April, 1898, upon the verdict of a jury for \$500, and also from an order entered in said clerk's office on the 18th day of April, 1898, denying the defendant's motion for a new trial made upon the minutes.

*Charles F. Brown*, for the appellant.

*Graham Witschief*, for the respondent.

HATCH, J. :

This is an action brought to recover damages for an alleged illegal arrest and imprisonment of the person of the plaintiff. The complaint avers that "the plaintiff having purchased a ticket for Newburgh, N. Y., and being about to board a train of the West Shore Railroad Company bound for that place, was seized by an employee of the defendant, who maliciously and without probable cause, and without authority of law, \* \* \* locked him up in a small room, used by defendant for a baggage room, in the railroad station at Highland, N. Y. (the station at which the plaintiff attempted to board the train), and then and there searched the clothes and per-

son of plaintiff, and subjected him to other indignities against his protests, and there detained the said plaintiff as a prisoner and restrained him of his liberty against his will for the space of an hour and one-half." Upon the trial there was no evidence given showing that the plaintiff purchased a ticket of the defendant entitling him to ride to Newburgh, or that he was in possession of any ticket which entitled him to ride upon defendant's train to Newburgh, or to any other place upon defendant's road, nor did the plaintiff show any legal right to board the train he was attempting to board when the arrest was made. He did not, therefore, stand in the relation of a passenger to the defendant, and may not, in consequence, invoke the rule which obtains when such relation is established. The averments of the complaint in this respect stand wholly unsupported by the proof. It also appears by the evidence that the person who made the arrest, and the one who guarded plaintiff's place of imprisonment and forcibly detained him therein, were not employees of the defendant, and had no connection whatever with it. Nor did it appear that these persons were directed to arrest and detain the plaintiff by any person connected with the defendant, or that they were acting in its behalf. There was, therefore, no basis upon which liability of the defendant could be predicated for acts committed by these persons. It did appear by the proof that one Morehead entered the place where the plaintiff was confined, after his arrest, searched his clothing, committed some indignities upon his person and applied to him abusive language. The evidence established that Morehead was employed by the defendant as a detective and was subject to directions by its law department. No proof was given showing what duties were devolved upon Morehead, what authority he possessed or what he was directed to do, except as the court would be authorized to infer from the term "detective." The case is barren of evidence showing any direction by Morehead to arrest the plaintiff, and it is also barren of proof showing any affirmative direction by the defendant to Morehead either to compass the arrest of the plaintiff or to do the acts which he did after the plaintiff was arrested.

The general rule is that the master is responsible for the acts of a servant where he has granted authority or imposed a duty to act in respect of the business in which the servant is engaged when the

wrong was committed, and the act complained of was pursuant to the course of employment in which the servant was engaged or had authority to do. (*Cohen v. D. D., E. B. & B. R. R. Co.*, 69 N. Y. 170.) It matters not that the servant's acts are reckless and that thereby unnecessary injury is inflicted, or that he abuses his authority or departs from his instructions, or through infirmity of temper adds slander to his other wrongdoing—all are unavailing to shield the master so long as the things which are done are done in the prosecution of the business of the master. (*Palmeri v. Manhattan R. Co.*, 133 N. Y. 261.) And this is the rule even though such acts be not only negligent, but wanton and willful. (*Burns v. Glens Falls R. R. Co.*, 4 App. Div. 426.) Unless acting within the scope of authority the master is not responsible for the servant's acts. (*Meehan v. Morewood*, 52 Hun, 566; *affd.*, 126 N. Y. 667; *Mulligan v. N. Y. & Rockaway Beach R. Co.*, 129 id. 506.) Those cases sufficiently illustrate the distinction and the subject needs no further elaboration. The negligent or willful misconduct of the servant must not only be shown, but equally so that the act was within the scope of employment before liability of the master is established. The rule, like many others, is clear; the difficulty lies in applying it to particular facts. As applied to the present proof we think liability was not established. There is no such settled significance attached to the term "detective" as of necessity imports authority to arrest criminals or persons charged or suspected of committing criminal acts. Where the business of the master requires the performance of such acts, and the employment of the detective is in connection therewith, or if there be expectation that he may be required to make arrests in the discharge of the duties intrusted to him, liability may attach. But it is essential that evidence of such conditions be given sufficient to warrant the inference. In some cases slight proof would be required, depending in large measure upon the business prosecuted by the master, from which a jury might find the act to be within the scope of employment. But it is quite well known that the term "detective" is applied to persons in the employ of various individuals and corporations whose authority is limited to the collection of evidence and the performance of other acts having sole reference to civil litigation. Some are employed in the surveillance of employees suspected of bad habits and practices which unfit them for retention

in places of trust and confidence. There exists a wide scope of employment of persons called detectives which scarcely has connection with crimes or criminals, and in which no arrest of persons is authorized or contemplated. Under such circumstances there would exist no authority for holding the master responsible for the arrest, detention and search of an individual. Such case would fall within the determination made in *Mali v. Lord* (39 N. Y. 381) where the master was held exempt.

Upon the proof in this case we are of opinion that the acts of Morehead were not made to appear as having been committed within the scope of his authority. From all that appears it is quite as consistent with the conclusion that he acted from personal motives and for his own purposes, as that he acted in the prosecution of any matter committed to his care by the defendant. If there were doubt upon this point it would present a question for the jury. (*Rounds v. D., L. & W. R. R. Co.*, 64 N. Y. 129.) Upon the evidence, however, there was not sufficient to warrant a submission of the question to the jury, and the motion for a nonsuit should have been granted.

There was also a fatal error committed in the charge of the court. The learned judge charged that the arrest was made by the servants of the defendant without any justification; that the defendant was liable, and the only question was one of damages. To this charge exception was taken. The learned court labored under a clear misapprehension of the testimony. It was undisputed that the arrest was made by a person having no connection whatever with the defendant.

It follows that the judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

EGBERT B. ELLISON and J. HUYLER ELLISON, Composing the Firm of ELLISON & Co., Appellants, v. SARAH M. CREED, Respondent.

34	15
50	41

*Contract for the erection and sale of a heating apparatus—what use by the vendee, after discovery of defects therein, constitutes an acceptance thereof—counterclaim.*

A vendee in a contract for the erection in her dwelling house of a hot water heating apparatus, which was tested about Christmas, 1895, who, although she finds some fault with it, never repudiates the work or orders or suggests that the apparatus be removed, but continues to use it up to the time of the trial, on the 17th day of February, 1897, of an action brought to enforce payment of the value thereof, must be considered to have accepted the apparatus, and cannot interpose as a defense the existence of defects therein discovered early in the year 1896.

*Seem*, that the vendee might have set up, by way of counterclaim, any damages which she had sustained because of such defects.

HATCH and CULLEN, JJ., dissented.

APPEAL by the plaintiffs, Egbert B. Ellison and J. Huyler Ellison, composing the firm of Ellison & Co., from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Queens on the 2d day of March, 1898, upon the report of a referee dismissing the complaint upon the merits in an action brought to foreclose a mechanic's lien.

*James C. Van Siclen*, for the appellants.

*W. J. Stanford*, for the respondent.

WOODWARD, J. :

The plaintiffs in this action succeeded to the business of their father, Thomas J. Ellison, a steam and hot water heating engineer, who in the fall of 1895 entered into a contract or agreement with the defendant to furnish and erect a hot water heating apparatus in her dwelling house. The boiler and radiators were put in and connected, and soon after Christmas, 1895, the fires were started and the test was made, and so far as the evidence shows, this test was satisfactory to all concerned. Although there is some evidence that the defendant found some fault with the heating apparatus, there is no evidence in the case to show that she ever repudiated the work, or that she ever ordered or suggested that it be removed. On the con-



trary, it appears from the testimony of defendant's witnesses that the heating apparatus was still in her house, and that she continued to use it up to the very day of the trial of this action. In view of this fact, we are unable to reconcile the referee's conclusions of law, "that the said Thomas J. Ellison and the plaintiffs failed to perform said agreement with the defendant," and "that the defendant is entitled to judgment against the plaintiffs dismissing the complaint, with costs," with the evidence. We know of no rule of law which permits one person to allow another to enter upon his premises and put in machinery and apparatus for the benefit of the owner, accepting the use of the same, without being liable for the fair and reasonable value of such property. If the defendant had put in a counter-claim for damages due to a failure on the part of the plaintiffs to put in a heating apparatus according to contract, there might be some force in the finding of the referee, that "under said agreement said Thomas J. Ellison did put in said dwelling house a certain steam heating apparatus and appurtenances, but the same were not capable of heating said rooms, or any of them, according to such agreement;" but what bearing this can have upon the case at bar, where the defendant has accepted and continued to make use of the apparatus after the alleged discovery of the defects, we are unable to understand. "If the fault was trivial or of such a character as easily to be remedied," say the court in the case of *Chambers v. Lancaster* (3 App. Div. 215), Mr. Justice CULLEN writing the opinion, "the defendant would be justified in using the machines and not precluded from returning them upon the subsequent appearance or discovery of a gross defect that would render the machines useless or materially impair their value. But in this case, after the machines had repeatedly broken down in vital parts, and the inadequacy of the machines to perform the specified work had become apparent, the defendant company still continued to use them. This operated as an acceptance." The like doctrine is asserted in the case of *Wiles v. Provost* (6 App. Div. 1), where the court say that "The vendee is entitled to a reasonable time for examination, but if he intends to reject the article furnished as not in compliance with the contract, he must not, after such examination and after discovering its true condition, do anything inconsistent with the vendor's ownership." "He would," say the court in the case of *Brown v. Foster*

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(108 N. Y. 387), "in such a case as the present, be entitled to a reasonable time for examination ; long enough to put the machinery in motion and see it operate, and he might for that purpose do with it whatever was necessary, and if, after such examination, without dealing with it in any other way or for any other purpose, he rejected it, acceptance could not be implied. The evidence in this case, however, permits an inference that the plaintiff exercised a dominion over the machinery inconsistent with ownership in the defendants, and consistent only with title as well as possession in himself. He used the machinery in the prosecution of his business, and although complaining did not intermit its use. Knowing its defects, he continued to run it. His intent in so doing may be gathered from his acts as well as from his words, and it cannot be said as matter of law those acts do not afford substantial proof of an acceptance, not for the purpose of examination, but for use."

In the case at bar the alleged defect in the heating apparatus was discovered early in the year 1896, yet at the time of the trial of this action, on the 17th day of February, 1897, the defendant was still using the heating apparatus in her house. This use of the apparatus is inconsistent with ownership on the part of the plaintiffs, and establishes an acceptance on the part of the defendant for which she is clearly liable to the plaintiffs. If the apparatus was not such as the defendant contracted for, she might have refused to accept it, or she might have set up a counterclaim for any damages which she may have sustained ; but she cannot go on using the apparatus as her own and refuse to compensate the plaintiffs, who have invested their time and money in the property which she has converted to her own use.

The judgment in favor of the defendant should be reversed and judgment for the plaintiffs should be entered, with costs.

All concurred, except HATCH, J., who read for affirmance, with whom CULLEN, J., concurred.

HATCH, J. (dissenting):

This action is one to foreclose a mechanic's lien. Before the plaintiffs are entitled to succeed in the action they must show substantial compliance with the contract. (*Glacius v. Black*, 50 N. Y.

145.) An examination of the record, as I view it, shows that the court was justified in finding that the contract was in no sense performed. The testimony tended to establish that the heating apparatus was not sufficient, and did not answer the terms of the contract. Indeed, the testimony of Smith tended to establish that no contract was made with the defendant, of any character, but that he made the contract and became responsible for its fulfillment, in consequence of which no debt existed in favor of the plaintiffs. The referee, however, seems to have disregarded this testimony and rendered his decision based upon the theory that the contract was not performed. It is not contended by the plaintiffs that they performed the contract which the testimony of Smith and Mrs. Creed tended to establish was made. The plaintiffs' view is that they made no such contract, but that they had complied with the arrangement which they did make. The referee found that the plaintiffs failed in the fulfillment of their contract, and I can see no view on which his conclusions can be disturbed as being against the weight of the testimony. The only basis which could authorize the maintenance of this action is found in the use of the article by the defendant. But upon this subject it appears that the apparatus was put in the house in December, 1895, and the lien was filed on the 12th day of March, 1896. There is evidence tending to establish that during this period the defendant complained that the contract had not been fulfilled, and while complaint was not made by the defendant to the plaintiffs, it was made to Smith, who made the arrangement with the plaintiffs, and the plaintiffs agreed to remedy the defects. They never did, but brought this action to foreclose the lien about the 31st day of July, 1896.

It seems to be conceded that if the defendant had notified the plaintiffs to remove the apparatus from the house she could not be charged with liability based on the ground that it had been accepted. I do not think this can change the result; *first*, for the reason that no such point was made upon the trial; and, *second*, the contract is entire, with no obligation to pay resting upon the defendant until the completion of it. The apparatus was so attached to the building as to become a part of the structure. Under such circumstances, there having been a substantial failure to perform, the plaintiffs were not entitled to recover, even though to some extent the defend-

ant enjoyed whatever benefit was to be derived from the use of the apparatus. Indeed, at the most, whether the defect was waived was a question of fact, and the referee must be deemed to have found that there was no waiver. (*Smith v. Brady*, 17 N. Y. 173.) This case is authority unshaken for this proposition. (*Mack v. Snell*, 140 N. Y. 193, 198; *Anderson v. Petereit*, 86 Hun, 600.)

If the plaintiffs had relied upon their claim of acceptance to sustain their action they should have urged it upon the attention of the referee at the trial; but they planted themselves squarely upon the ground that they had performed their contract and were entitled to recover for that reason. Such was the theory of the trial, and such was the determination against them upon this issue by the referee.

I do not see, therefore, upon what legal ground this judgment can be reversed.

CULLEN, J., concurred.

Judgment reversed and a new trial granted before a new referee to be appointed at Special Term, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ADOLPH H. SCHUMANN, Relator, v. JAMES McCARTNEY, Commissioner of Street Cleaning of the City of New York, Respondent.

*Greater New York*—a veteran appointed inspector of street cleaning of the city of Brooklyn subsequently transferred to the same department of Greater New York—power of the street commissioner to remove him.

A veteran of the War of the Rebellion, holding through a civil service examination the office of inspector of street cleaning of the city of Brooklyn prior to January 1, 1898, under provisions of law forbidding his removal from office except for good cause shown after a hearing had upon due notice, who on January 3, 1898, is transferred to the department of street cleaning of the city of Greater New York, enters such employment, by operation of law, under the same conditions which surrounded his employment by the city of Brooklyn.

The provisions of section 537 of the charter of Greater New York, giving the commissioner of street cleaning of that city power in his discretion to remove any member of the uniformed force of street cleaners "on evidence satisfactory to him," do not apply to such inspector thus transferred, who is within the protection of section 127 of that charter providing for the retention of veterans "in like positions" and "under the same conditions" by the new corporation.

Such an inspector, after receiving notice on March 8, 1898, of his suspension from duty, was on the morning of the ninth served with a notice to appear before the commissioner of street cleaning in the afternoon of that day for a hearing; upon appearing before the commissioner he was sent to a subordinate officer for trial, where, without having had previous notice of the charges against him, or an adequate opportunity to meet them, he was confronted by two unsworn witnesses who testified to alleged facts constituting charges of neglect of duty, and he was thereafter dismissed by the commissioner.

*Held*, that such proceeding was in no sense a judicial investigation;

That it was improper to receive in such proceedings for removal the testimony of witnesses not given under the responsibility of an oath;

That the inspector was entitled to be reinstated in his position.

CERTIORARI issued out of the Supreme Court and attested on the 10th day of May, 1898, directed to James McCartney, commissioner of street cleaning of the city of New York, commanding him to certify and return to the office of the clerk of the county of Kings all and singular the proceedings had in regard to the reduction of salary and the dismissal of the relator from employment in the street cleaning department of the city of New York.

*Thomas F. Magner*, for the relator.

*William J. Carr* [*Almet F. Jenks* with him on the brief], for the respondent.

WOODWARD, J.:

The relator is a veteran of the War of the Rebellion, and in 1894, having passed the civil service examination required by law, he was appointed an inspector of street cleaning by the then commissioner of city works of the city of Brooklyn, continuing in such position until the absorption of the city of Brooklyn into the Greater New York on the 1st day of January, 1898, when, by virtue of the provisions of chapter 378 of the Laws of 1897, he became an employee of the latter city. On the 21st day of January, 1898, the deputy commissioner of street cleaning in the borough of Brooklyn requested the relator to resign his position, which the relator refused to do, setting up his right to retain his position under the provisions of the law in relation to veterans of the War of the Rebellion. Subsequently and on the 31st day of January, 1898, the relator was informed by the same deputy commissioner that he had been transferred to the department of street cleaning, with the rank of section

foreman, at a salary of \$1,000 per annum, or \$200 per year less than he had been receiving while in the employ of the city of Brooklyn. He remained employed in the new capacity at the reduced salary until the first of March, when he was transferred to a new and enlarged district, embracing sixty-three miles of street. On the eighth day of March he received a notice of his suspension from duty, and on the ninth day of March, at eleven o'clock A. M., he received a notice to appear before the commissioner of street cleaning at three o'clock in the afternoon of that day for a hearing. He was not notified of the charges against him, nor was he given any time for preparation. He appeared before the commissioner and was sent before a subordinate for trial, where he was for the first time confronted by the charge, and by two witnesses, who, without being sworn, were permitted to testify to the alleged facts constituting the charges of neglect of duty. The relator was given no adequate opportunity to meet the charge brought against him, and the commissioner concluded that "Upon evidence satisfactory to me you are guilty of neglect of duty and disobedience of orders in that you failed to cause your section to be properly cleaned and in submitting a false report in stating that certain streets were cleaned while in fact they were not." Upon this finding the relator was dismissed from the service of the city of New York, and the matter comes before this court upon a writ of certiorari to determine whether the commissioner has acted within the law in thus dismissing the relator.

There is no dispute that the relator was a veteran of the War of the Rebellion, and that he was holding office in the city of Brooklyn prior to the 1st day of January, 1898, under provisions of law which forbade his removal from office "except for good cause, shown after a hearing had" (§ 29, tit. XXII, chap. 583, Laws of 1888, charter of city of Brooklyn), or "except for incompetency or misconduct shown, after a hearing upon due notice, upon the charge made, and with the right to such employe or appointee to a review by writ of certiorari; a refusal to allow the preference provided for in this act to any honorably discharged Union soldier, sailor or marine, or a reduction of his compensation intended to bring about a resignation, shall be deemed a misdemeanor, and such honorably discharged soldier, sailor or marine shall have a

right of action therefor in any court of competent jurisdiction for damages, and also a remedy by mandamus for righting the wrong. The burden of proving incompetency or misconduct shall be upon the party alleging the same." (Chap. 821, Laws of 1896.) By the provisions of section 127 of the Greater New York charter, "All veterans, either of the army or navy or the volunteer fire departments, now in the service of either of the municipal and public corporations hereby consolidated, who are now entitled by law to serve during good behavior, or who cannot under existing law be removed except for cause, shall be retained in like positions and under the same conditions by the corporation constituted by this act, to serve under such titles and in such way as the head of the appropriate department or the mayor may direct." It is evident, therefore, that the relator entered the employ of Greater New York by operation of law "under the same conditions" by which he was surrounded in his employment by the former city of Brooklyn; and it was not within the power of the commissioner of the street cleaning department of the Greater New York, acting under the provisions of section 537 of the Greater New York charter, to arbitrarily remove him from his position, or to do so after a hearing which was entirely lacking in the elements of a judicial investigation of the charge made against the relator.

The Greater New York charter, like all other statutes, is to be considered in its entirety, and it is the duty of the courts to give effect to all of its provisions where such a result is possible. Section 537 gives the commissioner power "in his discretion, on evidence satisfactory to him," to remove any of the members of the uniformed force of street cleaners; but this power relates to the uniformed force which "shall be appointed by the commissioner of street cleaning" (§ 536), and not to those who are transferred by operation of law, and who were, at the time of the transfer, within the protection of the laws made for the purpose of continuing veterans of the War of the Rebellion in civil positions. Section 127 of the Greater New York charter was designed to preserve the rights secured by special and general statutes to the veterans of the War of the Rebellion, who were in the employ of any of the municipalities making up the Greater New York; they were to "be retained in like positions and under the same conditions" by

the new corporation. It was one of the compromises necessary to bring about the consolidation, and section 537 is to be construed as modified by the provisions of section 127, and the commissioner of the street cleaning department gained no new powers over the relator by reason of his transfer. As was said by Mr. Justice WILLARD BARTLETT in *People ex rel. Speight v. Coler* (31 App. Div. 523), in considering this same provision of law: "At the time when this provision took effect, the relator, an honorably discharged sailor of the late War of the Rebellion, was in the service of the city of Brooklyn as collector of fees at Wallabout market. If he could not under the law as it then existed be removed except for cause, he became entitled upon the consolidation of the several municipalities to be retained in a position similar to that which he then occupied, to serve under such title and in such manner as the comptroller or mayor might prescribe."

This view of the law gives effect to both provisions; it enables the commissioner to discharge such members of the uniformed force as he shall have appointed, following the reasoning laid down in *People ex rel. Lee v. Waring* (1 App. Div. 594) while preserving to those who were in office in the city of Brooklyn, under the protection of the veteran acts, all of the rights which they had at the time of the consolidation and which were guaranteed to them by the provisions of section 127. The language of the statute is, not only that they shall "be retained in like positions," but they shall be "under the same conditions." Veterans of the War of the Rebellion, employed by the city of Brooklyn, could not be removed "except for good cause shown, after a hearing had," or "except for incompetency or misconduct shown, after a hearing upon due notice, upon the charge made," and with "the burden of proving incompetency or misconduct \* \* \* upon the party alleging the same." (Chap. 821, Laws of 1896.)

There was no hearing, in any judicial sense, in the case now under consideration. The relator, as was said in *People ex rel. Jordan v. Martin* (152 N. Y. 311), "Ignorant of his rights, without counsel or witnesses, he stood before his superior officer and judge virtually helpless and mute, because he had not been given the time and opportunity to defend that the law prescribes both for the guilty and the innocent." This was peculiarly the case with the relator; he did



not receive his notice of a hearing until eleven o'clock of the day on which he was requested to appear at three o'clock in the afternoon, and he was given no opportunity to have counsel or to make any preparation. Indeed, it is not pretended, on the part of the respondent, that any judicial inquiry was entered into, and he evidently relies upon the provisions of section 537 of the charter of the Greater New York, for he recites in his order of dismissal that "Upon evidence satisfactory to me you are guilty of neglect of duty," which is substantially the language of the statute in the section referred to above; and in the brief of counsel for the respondent we are cited to this provision of the law. This, as we have already seen, is not sufficient. The relator cannot be deprived of his position upon evidence satisfactory to the commissioner, unless that evidence is procured in the course of a judicial investigation, where the relator has been informed of the charge against him and has had an opportunity of examining the witnesses against him and of presenting evidence in his own behalf. On the hearing, at which the "evidence satisfactory" to the commissioner was elicited, the witnesses were not put under oath, and the entire proceeding was a mere mockery of justice.

"The relator," say the court in *People ex rel. Kasschau v. Police Commissioners* (155 N. Y. 40), "was not subject to removal except for some legal cause, to be ascertained and adjudged as matter of fact upon a hearing. This contemplates a judicial investigation in which there must, at least, be some legal responsibility for perjury, or some protection to the accused against falsehood. The issue to be determined was one of fact. The proceeding was judicial in character, and hence the tribunal before which the investigation was had could not dispense with the usual form of procedure by acting upon statements not given under the responsibility of an oath. When the court proceeded to judgment, without the observance of such an essential prerequisite to every judicial inquiry, the determination was not judicial in character, or such as the statute contemplates. While some latitude is allowed with respect to the rules of evidence, yet to remove a party from a public office upon a charge involving a question of fact, without even swearing the witnesses, is to abandon the fundamental form of judicial action. A determination thus made is not the result of a trial or a hearing in any

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proper sense, and hence the relator was removed from office without such a trial or hearing as the law contemplates. \* \* \* When a party is protected in the enjoyment of a public office or employment from removal except for cause, to be ascertained and adjudged upon a hearing of a judicial nature, and it appears that he has been removed without any proof of the necessary facts upon oath, the determination, if not absolutely without jurisdiction, is clearly erroneous as matter of law."

If, then, the relator was under the protection of the veteran acts, and that he was does not seem to be open to dispute, the action of the commissioner in dismissing him from the service of the Greater New York without a hearing, in which the forms of a judicial investigation were observed, was without authority, and he is clearly entitled to the relief asked for in the present proceeding.

The determination of the commissioner of street cleaning should be reversed, and the relator should be restored to "a like position and under the same conditions" as those which prevailed at the time of the consolidation of New York and Brooklyn and the other municipalities which go to make up the Greater New York.

All concurred.

Determination annulled and relator reinstated, with fifty dollars costs and disbursements.

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SARAH A. M. KIRBY, Respondent, v. CHARLES H. KIRBY, Appellant.

*Bill of particulars not granted in an action for alienating a husband's affections by depreciating his wife.*

A bill of particulars should not be granted in an action brought by a wife, in which she charges her husband's uncle with no other improprieties than that he had alienated her husband's affections and had broken up her home by a continued depreciation of the plaintiff as his wife.

APPEAL by the defendant, Charles H. Kirby, from an order of the Supreme Court, made at the Dutchess County Special Term and entered in the office of the clerk of the county of Dutchess on

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the 10th day of August, 1898, denying the defendant's motion for a bill of particulars.

*Charles F. Cossum*, for the appellant.

*Frank B. Lown*, for the respondent.

Order affirmed, with ten dollars costs and disbursements, on opinion of BARNARD, J., at Special Term.

All concurred.

The following is the opinion of BARNARD, J., at Special Term :

BARNARD, J. :

A bill of particulars would be a difficult matter to frame in an action such as this. A wife charges her husband's uncle with alienating her husband's affection and breaking up her home. There is no impropriety alleged other than a continued depreciation of the plaintiff as a wife. Such a complaint must be made out by proof presumably of many instances and probably on many occasions ; here a little and there a little. The general allegation is made : You depreciated me to my husband and destroyed my happiness. Such a general charge can be easily met.

Motion denied, with ten dollars costs to abide event.

# Cases

. DETERMINED IN THE

## SECOND DEPARTMENT

IN THE

### APPELLATE DIVISION,

**November, 1898.**

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CHARLES W. DALY, Appellant, v. JENNY A. CORNWELL,  
Respondent.

*Contract to sell land — liability of one of several contract vendors who persuades some of her co-vendors not to execute a deed.*

The fact that one of several owners of real estate who have contracted to sell their interest in the premises, has afterwards influenced some of the owners to refuse to execute a deed thereof in pursuance of a written contract executed by their attorney and agent on their behalf, in reliance upon which contract the purchasers have employed counsel to search the title, and have arranged for a loan to be made to them upon said premises, does not create a cause of action against her for damages, no fraudulent representations or conspiracy being alleged.

*It seems*, that even if the moral obligation of such vendor to abstain from interference with the execution of the contract were not one of those imperfect obligations which the law does not undertake to enforce, a complaint based thereon would be defective where it did not allege that such vendor induced all the other parties interested not to execute the deed of the premises, as in such case *non constat* but that some of the other owners, to whom such vendor had not presented persuasion or inducement, might refuse to execute the conveyance, and thus have prevented the consummation of the sale.

APPEAL by the plaintiff, Charles W. Daly, from an interlocutory judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 21st day of May, 1898, upon the decision of the court rendered after a trial at the Kings County Special Term sustaining the defendant's demurrer to the plaintiff's complaint.

*Richard T. Greene*, for the appellant.

*George A. Miller*, for the respondent.

GOODRICH, P. J. :

The demurrer is on the ground that the complaint does not state facts sufficient to constitute a cause of action. The complaint alleges the following facts: That on December 20, 1897, Helen Burnett died intestate and seized of certain premises on Clinton street, New York city, leaving as her only heirs at law and next of kin eight persons, of whom the defendant was one; that letters of administration were issued to one Gilhooly, who thereafter acted as attorney for all said heirs in the management and sale of the real estate of the intestate; that one of the said heirs sold to the other seven heirs his interest in the property, and conveyed the same to the said Gilhooly, as agent and attorney and trustee for said seven heirs; that on December 20, 1897, Gilhooly, as attorney and general agent for the said seven heirs, entered into a written contract with Kantorowicz and Simon, a copy of which contract is set out in the complaint. This contract purported to be between Gilhooly, "as agent and attorney for the owners" of such property, of the first part, and Kantorowicz and Simon of the second part, and was signed with the individual names of the three parties to the contract. Gilhooly, as agent and attorney for the owners, agreed to sell the premises to Kantorowicz and Simon for \$27,000, of which sum \$500 was to be allowed to Kantorowicz for commission, so that the net purchase price was to be \$26,500, of which \$500 was to be paid by the vendees at the execution of the contract and the balance in cash on the delivery of the deed. The complaint further alleges that the defendant "was the only one of the said heirs who made objection to the said contract as executed," and that on December 27, 1897, she and Gilhooly agreed with Kantorowicz and Simon that if the purchase price should be increased to \$27,000, clear of all commissions, she "would then sign the deed for the said property, and that the said promise was then and there reduced to writing and the following memorandum thereof, to wit, 'The consideration has been changed to \$27,000, clear of all commissions, an increase of \$400,' was inserted at the foot of the said contract, and was then and there signed" by the defendant Gilhooly and the purchasers; that, in reliance upon the said contract and its performance by the defendant, Kantorowicz and Simon arranged for a loan and employed counsel to

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search the title, and upon the day appointed for the delivery of the deed tendered the balance of the purchase money to Gillhooly, who refused to deliver the deed; that the defendant, after signing such contract, "did, in violation of her said contract and agreement and of the rights of the said Kantorowicz and Simon thereunder, induce, persuade and *influence others of the said heirs* of the said Helen Burnett to refuse to sign the said deed when presented to them for signature, and for that purpose sent, or caused to be sent, a telegram or telegrams and letters to the *said heirs, or some of them*, and did personally orally *persuade and induce others of the said heirs* not to sign said deed, and that she, the said Jenny A. Cornwell, did, at all times after the signing of the said agreement, refuse and neglect to sign any deed of her interest in the said property to the said Kantorowicz and Simon, but that, on the contrary, in violation of her said agreement, she did sell or contract to sell her interest in the said property to other persons to this plaintiff unknown." The complaint further alleges that Kantorowicz, by reason of the said acts of the defendant, suffered damages in the sum of \$6,000, and that Kantorowicz and Simon have assigned their claim to the plaintiff.

The defendant demurred to this complaint upon the ground already stated; the court sustained the demurrer, and from the interlocutory judgment the plaintiff appealed.

It is evident that the gravamen of this complaint rests upon the theory that the defendant, having agreed to sell her interest in the property, was bound to abstain from any effort to prevent the completion of the agreement; that the legal effect of her contract to sell involved an agreement not to do any affirmative act which would prevent the consummation of the contract. We cannot agree with this theory. It may be that good morals and fair play required her, at least, not to interpose obstacles to the fulfillment of the contract, but she was under no legal obligation so to abstain. This action cannot be maintained except upon the theory that there was some legal obligation to that effect, for the action is not for conspiracy nor for fraudulent representation.

In *Ashley v. Dixon* (48 N. Y. 430, 432) the court laid down a rule in a case somewhat analogous to the one at bar, and said: "If A. has agreed to sell property to B., C. may at any time before the

title has passed, induce A. not to let B. have the property and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B.; A. alone, in such case, must respond to B. for the breach of his contract, and B. has no claim upon or relations with C. While, by the moral law, C. is under obligation to abstain from any interference with the contract between A. and B., yet it is one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce. But if C. makes use of any fraudulent misrepresentations as to B., to induce A. to violate his contract with him, then there is a fraud, accompanied with damages, which gives B. a cause of action against C.; as if C. fraudulently represents to A. that B. had failed or absconded, or had declared his intention not to sell to B.; and thus induces A. to sell to another. Here there is no proof of any fraudulent representations made by defendant to induce Patrick to violate his contract with the plaintiffs."

While this decision is not exactly conclusive upon the rights of the parties to this action, we recognize the forceful similarity of the principle involved in both cases, and express our belief that this action, like the *Ashley* action, is brought to enforce "one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce."

In addition to this, even upon the plaintiff's own theory, the complaint is clearly defective. It alleges, not that the defendant persuaded and induced all of the other parties interested not to execute the deed for the premises, but only some of them; *non constat*, but that the contract fell through and the failure to execute the deed by all the parties resulted from the refusal of some one of the heirs to whom the defendant has presented neither persuasion nor inducement. The perfection of the plaintiff's theory required an allegation that the defendant persuaded and induced each and every one of the heirs not to sign the contract, and that by reason of such persuasion or inducement they did not sign.

On either ground the complaint is demurrable and the judgment must be affirmed.

All concurred in the result, except HATCH, J., absent.

Interlocutory judgment affirmed, with costs.

In the Matter of the Examination of DAVID CAMERICK, a Judgment Debtor, in Proceedings Supplementary to Execution Issued upon a Judgment against Him in Favor of JOSEPH W. ROSENZWEIG, a Judgment Creditor.

DAVID CAMERICK, Appellant; JOSEPH W. ROSENZWEIG, Respondent.

*Contempt of court — refusal of a judgment debtor to deliver to a receiver possession of his property which is commingled with goods consigned to him as agent.*

A judgment debtor, who has been ordered by the court to deliver to a receiver appointed in supplementary proceedings "all property and money now in his possession or under his control belonging to him and not exempt by section 2463 of the Code of Civil Procedure," is not excused from complying with a demand made by such receiver for "possession and control of the business and property" at a store kept by the debtor, by the fact that he has in such store a quantity of goods consigned to him for sale as well as a quantity of goods commingled therewith belonging to himself.

The refusal of the debtor in such a case to make delivery, so far as the store and the goods actually owned by him are concerned, constitutes a contempt of court, which is not excused by his statement that it is impossible for him to separate consigned from unconsigned goods without a day's labor and going over his stock piece by piece.

*Quære*, as to the duty of the judgment debtor to surrender the consigned goods.

APPEAL by David Camerick, the judgment debtor, from an order of the County Court of Kings county, entered in the office of the clerk of the county of Kings on the 28th day of June, 1898, adjudging him in contempt for a failure to turn over his store and business to the receiver appointed in the proceeding, with notice of an intention to bring up for review upon such appeal an order entered in said clerk's office on the 7th day of June, 1898, appointing a receiver of the property of said David Camerick.

*Charles F. Brandt*, for the appellant.

*Julius Henry Cohen*, for the respondent.

GOODRICH, P. J. :

In supplementary proceedings against a debtor he was examined, and thereupon a receiver "of all the debts, property, equitable interests, rights and things in action of the said judgment debtor," with the usual powers, was appointed. The debtor was ordered to



“deliver to the said receiver all property and money now in his possession or under his control, belonging to him and not exempt by section 2463 of the Code of Civil Procedure.”

It appeared that the debtor conducted, in his own name, a men's furnishing store at No. 521 Myrtle avenue. Of this store he had a lease, and in the store he had a quantity of goods consigned to him for sale, and also a quantity of goods belonging to himself. The goods were commingled. The receiver demanded of the debtor “possession and control of the business and property” at such store, and attempted to place his agent in charge. The debtor prevented such agent from taking charge, and refused to deliver the store or any of the goods, saying that it was impossible for him to separate consigned from unconsigned goods, without a day's labor and going over his stock, piece by piece.

Upon the presentation of these facts, the County Court adjudged the debtor guilty of willfully violating the order of the court appointing the receiver, and ordered that unless within forty eight hours he should deliver up the possession of the store and all goods contained therein, the judgment creditor, upon proof of the debtor's failure to comply with the order, might apply *ex parte* for an attachment against the debtor bailable in the sum of \$250, and further, in case of such failure, ordered that the motion to punish for contempt be granted, with \$10 costs, and that an order *ex parte*, to that effect, might be entered. From this order the defendant appeals.

In *Matter of Pye*, No. 1 (18 App. Div. 306, 308) this court held: “The motion to charge the appellant with contempt having been regularly conducted, presented for consideration the question only, whether the court had jurisdiction to make the order with which his disobedience was charged and established in such manner as to subject him to that imputation.”

Following this authority, we think the debtor was guilty of disobedience of the order appointing the receiver. Certainly this is clear as to the store and the goods actually owned by the debtor, and his refusal to deliver them would be sufficient to justify the adjudication for contempt. It is unnecessary to examine the further question as to the order for the surrender of the consigned goods, although the demand for the store and for the goods which the debtor owned was coupled with a demand for the possession of such

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consigned goods. The debtor was guilty of contempt in refusing to surrender the store and the goods which, by his admission, were owned by him.

The order must be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

EVELINA A. MESEROLE, Appellant, v. WILLIAM E. SINN, as Executor, etc., of WALTER L. SINN, Deceased, Respondent.

84	33
161	59
84	33
53	274

*Landlord and tenant — when premises may be given up by the tenant because of their being flooded as a result of gradual deterioration — proximate cause.*

A tenant of premises, which at the time of the lease were in such a state that by gradual deterioration they fell into a condition such that heavy rain soaked into or ran into and flooded the cellar so as to render the premises untenable, may quit and surrender the possession of the same under the provisions of section 197 of chapter 547 of the Laws of 1896 (The Real Property Law), and escape further payment of rent therefor.

In such a case water, one of the elements, will be deemed to have been the proximate cause of the injury.

APPEAL by the plaintiff, Evelina A. Meserole, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 16th day of March, 1898, upon the verdict of a jury, and also from an order entered in said clerk's office denying the plaintiff's motion for a new trial made upon the minutes.

The action was brought to recover rent.

*Michael Fennelly*, for the appellant.

*James Troy* [*Thomas H. Troy* with him on the brief], for the respondent.

GOODRICH, P. J. :

On November 27, 1894, the plaintiff by written lease demised to Walter L. Sinn the premises known as No. 404 Fourth street,

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Brooklyn, for a term of eighteen months. Mr. Sinn entered into the premises and occupied them until October 24, 1895, when he vacated and surrendered them on the ground that they had become and were so injured by the elements and other causes as to be absolutely untenable and unfit for occupancy.

The evidence shows, and the plaintiff's counsel in his brief concedes, that after heavy rainstorms water flowed into the cellar so that it had to be bailed out on each of such occasions. There was evidence tending to show that, after heavy rainstorms, water entered the cellar through the walls and foundations to the depth of several inches; that the foundations were always damp, and that when the house was closed at night it became damp and close; that the same result followed from melting snow; that the tenant became sick and died subsequently to his removal from the house, and that his children also became sick with malaria. There was medical and other evidence tending to show that the house was not a safe one to live in, and perhaps this might be assumed judicially.

The court fairly submitted to the jury the condition of the premises at the time of the surrender, saying: "The only question that you have to pass upon is whether this place, from the element of water, got in such a condition, gradually or all at once, that it was untenable and unfit for occupation." We must assume, therefore, that a verdict for the defendant established as a fact that the premises became so injured by water as to be untenable and unfit for occupancy. The verdict having established this fact, the next question was whether they became so without any fault or negligence of the tenant. That question also was submitted to the jury when the court instructed them specifically that if the defect "came from the neglect of the tenant in not attending to the premises and not remedying it; that is to say, if he could do so, and if it was a thing within his attention and which was for him to do," then the verdict must be for the plaintiff.

With these facts found in favor of the defendant, we are brought to a consideration of the effect of chapter 345 of the Laws of 1860, as that act was in force at the time of the execution of the lease in question. It was repealed by chapter 547 of the Laws of 1896, known as "The Real Property Law," but was substantially re-enacted by section 197 of that law. The act of 1860 reads as follows:

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"The lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed, or be so injured by the elements, or any other cause, as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant, and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises and of the land so leased or occupied."

It is so well settled that it is not open to discussion in this State, that a lease of real property contains no implied covenant that it is reasonably fit for habitation; and that in the absence of an express covenant, unless there has been fraud, deceit or wrongdoing on the part of the landlord, the tenant is without remedy, even if the demised premises are unfit for occupancy. In such cases the tenant hires at his peril, and a rule similar to that of *caveat emptor* applies, and throws on the lessee the responsibility of examining as to the existence of defects in the premises and providing against their ill-effects (*Franklin v. Brown*, 118 N. Y. 110), and the court so charged. The respondent concedes that no element of fraud or deceit arises on the evidence. Nor was there any covenant in the lease, or any written agreement, requiring the landlord to make any repairs or alterations. On the contrary, the lease contained a provision for the tenant's surrender of the premises at the expiration of the term in good condition, "damages by the elements excepted."

*Suydam v. Jackson* (54 N. Y. 450) held that the statute contemplated a sudden destruction or injury by the elements, and not the gradual deterioration produced by the ordinary action of the elements; but the authority of that case is much shaken by *Tallman v. Murphy* (120 N. Y. 345), where it was expressly held that all that was necessarily decided in the *Suydam* case was that "such injuries as are the result of failure to make ordinary repairs, when the landlord has not agreed to make them, do not come within the statute, because it was not intended to modify or change the relative duties of the parties to the lease in that respect." This eliminates from the decision its authority as to the necessity of a sudden and violent destruction of the premises.

The appellant contends that the statute relieves the tenant only where there is a total destruction of the premises or an injury to

the premises themselves rendering them untenable; and that as the premises here involved actually continued in the same condition, up to the time of the surrender, that they were in at the time of the lease, the circumstances do not call for the operation of the statute. We cannot agree with this contention. It fails to consider the words of the statute, that the rent is to cease if the premises not only "be destroyed," but also if they "be so injured by the elements, or any other cause, as to be untenable and unfit for occupancy."

The appellant practically contends that if the untenability resulted from the combination of a gradual deterioration of the premises with a sudden action of the elements, the statute furnishes no defense. This contention fails to take into account the words, "any other cause," broader terms than which could hardly be used.

Stripped of these preliminary objections, the question which remains to be considered may be stated most favorably for the plaintiff as follows: The premises at the time of the lease were in such a state that by gradual deterioration they fell into such condition that heavy rains soaked into, or ran into and flooded the cellar, so as to render the premises untenable. It is evident that except for the elements the premises would have been tenantable and fit for occupancy and that they were rendered untenable and unfit for occupancy, either by the elements or by some other cause. In other words, water, one of the elements, was the proximate cause of the injury, and by the interposition of this element the premises were rendered untenable and unfit for occupancy.

We need not inquire, therefore, whether the injury was the result of a combination of the two causes referred to, but may predicate on the verdict that it resulted directly from the element of water, without the presence of which there would have been no such injury. We are confirmed in our judgment by the decision of the Court of Appeals in *Sully v. Schmitt* (147 N. Y. 248), where the legal effect of the statute was under consideration. The premises, containing a defective sewer, were let to a tenant. The tenant endeavored to remedy the defect, but the landlord made no such attempt and continued to maintain the premises in an offensive condition, so that stench entered the building, creating a condition of

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things amounting to a nuisance dangerous to life. The court held that this constituted an eviction at law, warranting an abandonment of the premises under the law of 1860. A more full statement of the facts in this case is contained in the report of the appeal on a previous trial (*Sully v. Schmidt*, 11 N. Y. Supp. 694). That report contains a dissenting opinion by Mr. Justice HARCH, which was practically adopted in the Court of Appeals on the last appeal.

In *Vann v. Rouse* (94 N. Y. 401) it was contended that the court below erred in giving instructions to the jury: "That if, without fault or negligence on the part of the tenants, the rooms were untenable and unfit for occupancy, they were justified in leaving, and would not be bound thereafter to pay rent." The court held that this constituted no error.

It would seem to result necessarily from these authorities that, as the premises were rendered untenable and unfit for occupancy by the inflow of water, there was an eviction at law which justified the tenant in surrendering the premises, and that his estate is not liable to pay rent thereafter.

The judgment must be affirmed.

All concurred.

Judgment and order affirmed, with costs.

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FREDERICK JOHNSON and ABRAM J. LIGHT, Composing the Firm of  
JOHNSON & LIGHT, Respondents, v. THE CITY OF MOUNT VERNON,  
Appellant.

*Contract to fill in a street and maintain it at grade for a year — duty of the contractor as to continuing the work — direction of the street commissioner to stop.*

A contractor agreed to bring a street to a specified grade and to maintain it at such grade for a period of twelve months after the completion of the work, receiving pay therefor at the rate of thirty cents per "cubic yard of filling for embankment," the proposals for bids for the work stating that the engineer's estimate of the work to be done was a specified number of cubic yards for filling, which is to be "approximate only. \* \* \* The contractor shall have no claim against the city by reason of any variation between the quantities of the approximate estimate and the actual quantities as measured when the work is completed."

*Held*, that the contractor could not maintain an action against the city for the work done in bringing the street to grade, where, by reason of the swampy nature of the land, it had settled and been filled up on three or more different occasions, and had again sunk below the grade level within the year.

In such a case it is the duty of the contractor to continue the work until it has been accepted by the commissioner of public works of the municipality, or until such commissioner has improperly refused to give his certificate; and even where the contractor is justified in suspending the work by the direction of the commissioner, his right to take advantage of such direction is waived by his afterwards continuing the work.

APPEAL by the defendant, The City of Mount Vernon, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Westchester on the 23d day of March, 1898, upon the report of a referee.

*William J. Marshall*, for the appellant.

*David Swits* [*George C. Appell* with him on the brief], for the respondents.

GOODRICH, P. J.:

On December 9, 1896, the plaintiffs, who were general contractors, entered into two separate contracts with the city of Mt. Vernon, the defendant, to grade and otherwise improve parts of North Third avenue and Oakley avenue, two streets of the defendant. The contracts are identical in their provisions, except as to the localities. The city had previously issued "proposals" for "regulating, grading and otherwise improving" the streets. The proposals required material to be furnished by the contractor, according to plans and specifications. The work was to be paid for at the rate of thirty cents per cubic yard "of filling for embankment." The proposals stated that the engineer's estimate of the work to be done was 11,350 cubic yards for filling, which was stated to be "approximate only, and bidders are required to form their own judgment of the quantities and character of the work by personal examination of the ground, and of the specifications and drawings relating to the work. The contractor shall have no claim against the city by reason of any variation between the quantities of the approximate estimate and the actual quantities as measured when the work is completed, nor on account of any misunderstanding or misconception of the nature and character of the work or of the ground where it is to be executed."

The plaintiffs made a bid for the work named, using the words, "for filling placed in embankment, per cubic yard, the sum of thirty cents."

The plaintiffs thereafter entered into written contracts with the defendant, some of the provisions of which contracts we proceed to state. The plaintiffs agreed to "furnish and provide all the work and materials required in, toward or about the regulating, grading, and otherwise improving (the street in question), according to the several plans or drawings, and specifications prepared and placed in possession of the city clerk \* \* \* which said plans or drawings and specifications form and are to be considered as part of this contract." Among the specifications in the contract, the clause on grading reads as follows: "The avenue shall be graded to its entire width, by embankment, so that the carriageway, gutters and sidewalks may be shaped to conform to the drawings. The center of the street shall be made to conform to the established grade line, which is shown on the profile, and which will be indicated on the ground by the engineer by suitable grade stakes to be given by him from time to time as required."

Clause VI of the contract reads as follows: "That all work of any kind which, during its progress, or before the final acceptance of the whole work, shall become damaged from any cause whatsoever, shall be replaced and repaired to the satisfaction of the said Common Council and the Commissioner of Public Works, by the said parties of the second part at their own cost and expense."

Clause XIV provided that no payment should be made "until a certificate of the engineer of such work, as to the value of the work done, or that this contract has been fully performed, and the work finished, complete and perfect in every respect, has been filed in the office of the City Clerk."

Clause XVII. "That no work shall be considered as accepted which may be defective in construction or deficient in any of the requirements of the specifications, and that the said parties of the second part will correct any imperfect work, whenever discovered before the final completion and acceptance of the whole work."

Clause XXXI reads in part as follows: "That the contractor shall be responsible for the entire work until the time of its final acceptance, and shall keep the whole work executed by him in perfect order and repair for the period of 12 months after the comple-



tion of the same, at which time it may be accepted, if the work be then in good order, in conformity with the required grades, lines and dimensions, and if all other stipulations on the part of the contractor have been fulfilled."

The plaintiffs proceeded with the execution of the work, which consisted chiefly in furnishing filling to bring the streets to the required grade, and accomplished that result. Unfortunately, the streets ran through swampy, unstable ground, called by one of the witnesses a "bog meadow," and the embankment overloaded the foundation, causing the street to settle, so that bubbles appeared and the land on either side of the street was forced upwards. There is evidence tending to show that the plaintiffs on several occasions by adding more earth brought the street up to the grade, and that at some time Mr. Odell, the commissioner of public works of the defendant, ordered the plaintiffs to stop their work; that after this cessation of the work the streets again settled below grade and that the street at the time of the trial was lower than it was before the work was commenced. The plaintiffs, claiming that they had fulfilled their contract, brought this action against the city to recover \$9,773.70. The defendant answered, and the issues were referred to a referee, who directed judgment for the plaintiffs for the full amount claimed. From the judgment entered upon such report the defendant appeals.

It will be observed that the contract did not require the payment of a gross sum for the entire work, but the payment of thirty cents per cubic yard of material furnished. The referee found, as matter of fact, that the plaintiffs furnished material to the amount and of the value stated in the complaint, and that the defendant had wrongfully and unjustly refused to accept the work and to take the proper and necessary proceedings under the provisions of its charter to raise the moneys with which to pay the plaintiffs for the work performed.

In his opinion the referee says: "The contracts, however, did not specify the amount of filling to be required, either approximately or otherwise. \* \* \* The evidence shows that on more than one occasion the plaintiffs brought the street up to grade and that they duly demanded of the proper authorities the requisite certificate to entitle them to payment. The first question is, did they comply with their contracts? I think that they did. At the time they

were ordered to stop work they brought the street up to grade and were entitled to the proper certificate."

By the terms of the contract the plaintiffs agreed not only to bring the street to the specified grade, but to maintain it at such grade for the period of twelve months after the completion of the work. That they fully appreciated the force of these provisions is evidenced by the fact that after they first brought the street to grade and after it sunk into the swamp, they filled it up on three or more different occasions. The defendant made no representations whatever as to the character of the foundation of the locality, and the plaintiffs were bound to continue their work until it was accepted by the commissioner as a fulfillment of the contract, or until he improperly refused to give a certificate. The sinking of the street furnished no defense to their agreement to fill the street to grade and to keep it in perfect order and repair for twelve months after its completion. The city bound itself to pay thirty cents per cubic yard for all work necessary to the fulfillment of the contract, and the plaintiffs were bound to continue to furnish filling so long as it became necessary for the purpose of filling up to and maintaining the grade for a period of twelve months after the completion of their work. Their failure to do so prevents a recovery in this action.

But the plaintiffs contend that they were excused from further performance of the contract because Mr. Odell, the commissioner, directed them to stop further work. The testimony upon this subject is somewhat meagre. The plaintiff Light testified: "I was told to stop by the former commissioner, Mr. Odell," but it does not appear when this order was given. Mr. Odell was not examined as a witness, but his term of office expired and he was succeeded by Mr. McTague. The date of the latter's appointment does not exactly appear, but, being examined as a witness, in February, 1898, he testified that he had been in office about five months, which would make his term commence sometime in September, 1897. The contract was dated December 9, 1896. This action was commenced October 20, 1897, and the complaint alleges that the work was completed before that date. There is evidence tending to show that the work commenced December 1, 1896, and continued almost daily up to March 20, 1897, at which time there was a sus-

pension of the work until April fifth, from which time it continued daily up to April 14, 1897. This testimony is derived from "slips" furnished by the drivers of the wagons occupied in the filling, but it is difficult to determine from the record whether work was done at other times, and the counsel of the parties have furnished us no tabulation showing whether these slips cover the entire work for which payment is sought in this action.

It may be observed, however, that as Mr. McTague succeeded Mr. Odell about September, 1897, and as the slips furnished relate to work which was done only up to April, 1897, all of the work thus mentioned in the slips must have been done during Odell's incumbency. Mr. McTague testified: "No work has been done by Johnson & Light on these contracts since I have been commissioner, that I know of," but the plaintiff Light testified: "Mr. Odell was the commissioner of public works of the defendant at that time\* during all the time this work was in progress. I did work after the appointment of the present commissioner."

It is probable that the first part of this testimony of Light referred to the general work in filling the street to grade, and that the latter part related to work done in renewing the grade, so that the two statements may be easily reconciled, and we assume that the body of the work, upon the completion of which the plaintiffs claim the fulfillment of their contract, was done during Odell's term. But even if the plaintiffs were justified in suspending the work by the direction of Odell, the fact that they continued to work thereafter, and during the administration of McTague, constitutes a waiver of any rights which they might have acquired by obedience to the direction of Commissioner Odell.

The referee erred in finding that the plaintiffs had fulfilled their contract, and for this error the judgment must be reversed. This ruling makes it unnecessary to examine any of the other points presented by the appellant.

The judgment must be reversed and a new trial granted.

All concurred; HATCH, J., absent.

Judgment reversed and new trial granted before a new referee to be appointed at Special Term, costs to abide the event.

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\* *Sic.*

SILAS LAIRD, Respondent, v. FREDERICK M. LITTLEFIELD,  
Appellant.

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*Lloyds insurance policy—action against one of several indemnitors—basis of an additional allowance.*

In an action upon a Lloyds insurance policy against one of a number of individual indemnitors, to recover the proportionate amount of the loss for which such defendant is liable, an additional allowance of five per cent is not properly granted upon the entire amount of the loss covered by the policy, although the policy contains a provision that, to avoid multiplicity of suits, no action shall be maintained under the policy against more than one of the indemnitors, and that the final decision in such action shall be decisive upon each indemnitor, in the same manner as if he were sole defendant in a similar suit, "save and except, however, as to the matter of costs and disbursements."

In such a case the subject-matter involved is the sum payable by the defendant thus sued, and does not include the ulterior liability of the other individual indemnitors.

APPEAL by the defendant, Frederick M. Littlefield, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Dutchess on the 19th day of February, 1898, upon the decision of the court rendered after a trial at the Dutchess County Special Term, and also from an order entered in said clerk's office on the 10th day of February, 1898, denying the defendant's motion for a new trial made upon the minutes, with notice of an intention to bring up for review upon such appeal an order entered in said clerk's office on the 2d day of March, 1898, denying the defendant's motion for a retaxation of costs.

*George L. Allen*, for the appellant.

*George Wood*, for the respondent.

GOODRICH, P. J.:

This action was brought upon a policy of fire insurance, dated September 10, 1896, issued to the plaintiff by the Guardian Assurance Lloyds, and signed by twenty individual indemnitors, of whom the defendant was one. Each individual covenanted to pay one-twentieth of any loss. The policy covered a stock of drugs and other goods and the furniture, fixtures and other articles in a store occupied by the assured at New Hamburg, Dutchess county. It was

conceded at the trial that the property was destroyed by fire on September 13, 1896, and that its value was \$1,550. The complaint demanded judgment for \$77.50, one-twentieth of the loss, and interest. The defendant claimed that the premises were incumbered by a chattel mortgage and by a judgment and execution thereon which invalidated the policy according to its terms. It was admitted that prior to the issuance of the policy there had been such incumbrance, but there was evidence showing conclusively that the mortgage and judgment had actually been paid, though they had not been satisfied of record at the date of the policy. The trial court found such to be the facts and ordered judgment for one-twentieth of the loss, which with interest amounted to \$85.22. In that respect the judgment should be affirmed.

But we think it was error to grant an allowance of five per cent upon \$1,550, the entire amount of the loss.

Section 3253 of the Code of Civil Procedure, in cases of this character, authorizes an allowance of "a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject-matter involved." The sum both "claimed and recovered" in this action was \$77.50 and interest. The policy contained a provision that, to avoid multiplicity of suits, no action should be maintained under the policy against more than one of the indemnitors and that a final decision in such an action should be decisive upon each indemnitor, in the same manner as if he had been sole defendant in a similar suit, "save and except, however, as to the matter of costs and disbursements."

The subject-matter involved was the one-twentieth share of the entire loss, which the defendant was liable to pay. It did not include the ulterior liability of the other underwriters.

*The Atlantic Dock Company v. Libby* (45 N. Y. 499) was an action to prevent the use of certain premises in Brooklyn for the prosecution of certain business, and to recover \$1,000 damages. The premises were appraised as of the value of \$50,000. No damages were recovered, but the action was sustained as to the injunction, and an allowance of \$500 was granted. The court held that the value of the premises affected by the action was not the subject-matter involved, and the order making the allowance was reversed.

In *Struthers v. Pearce* (51 N. Y. 365) it appeared that, during

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the existence of a continuing partnership of undetermined duration, three of four partners, without the knowledge of the other, obtained a new lease in their own names, of the premises leased to, and used by, the firm, and the court held that upon dissolution the other partner was entitled to his proportion of the value of the lease. The court at Special Term granted an allowance of five per centum on the entire value of the lease. The Commission of Appeals (Lorr, Ch. J.) said (p. 368): "The claim of the plaintiff in the prayer of his complaint is that he may be paid one-fourth of the proceeds of the lease in question on the sale thereof; the recovery did not exceed his claim, and that was the whole amount of the 'subject-matter involved' in this action;" and affirmed the order of the General Term reducing the allowance to five per centum upon the value of the plaintiff's one-fourth interest.

The judgment should be modified by reducing the extra allowance to five per centum on the amount of the recovery named in the judgment, without costs to either party.

All concurred.

Judgment modified by reducing the extra allowance to five per cent on amount of recovery, and as modified, together with the order denying defendant's motion for a new trial, affirmed, without costs.

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WILLIAM N. DYKMAN, as Receiver of THE COMMERCIAL BANK,  
Appellant, v. SETH L. KEENEY and Others, Respondents,  
Impleaded with Others.

*Bank directors — their liability for declaring dividends — the question whether renewal notes were improperly credited as assets, how determined.*

An action was brought by a receiver of a bank to recover from the directors thereof dividends declared by them, on the ground that at the time the dividends were declared the bank had no surplus profits, and that, although there was an apparent surplus, it was created by certain notes improperly credited as assets, which, while by their terms they were not in default with interest unpaid for over a year, were renewals of previous obligations extending back for a long period of time, during which no interest or principal had been paid, except so far as the interest was included in the amount of the renewal notes or in separate obligations.

*Held*, that it was proper to submit to the jury the question whether the notes, taken in renewal of previous obligations, with the addition of the interest thereon, were taken in the due course of business and whether the amount of accrued interest included in the new notes represented loans of money such as would have been made apart from any prior relation of the debtors to the bank, or whether they were taken merely to cover defaulted debts, described in section 26 of chapter 689 of the Laws of 1892.

APPEAL by the plaintiff, William N. Dykman, as receiver of the Commercial Bank, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 12th day of April, 1898, upon the dismissal of the complaint by direction of the court after a trial at the Kings County Trial Term.

*James C. Bergen*, for the appellant.

*Alfred E. Mudge, Henry M. Dater and A. Simis, Jr.*, for the respondents.

CULLEN, J. :

This action is brought by the receiver of the Commercial Bank to recover from the defendants, who were formerly directors of the bank, the amount of a dividend declared by them in December, 1892, on the ground that at the time the bank had no surplus profits. A similar action has already been twice before this division of the court. (*Dykman v. Keeney*, 10 App. Div. 610; S. C., 16 id. 131.) On the first appeal a judgment rendered in favor of the plaintiff was reversed, and on the second appeal a judgment for the defendants, entered on a verdict by direction of the court, was affirmed. The opinions rendered by the court on these appeals discussed fully the general principles pertaining to the maintenance of the action and the liability of the defendants as directors, and also the basis or method of the computation by which the financial condition of the bank should be determined. It is, therefore, necessary for us to consider on this appeal only the question presented by the additional evidence adduced on the trial of the present action as to the character of certain securities held by the bank at the time of the dividend.

As to the financial status of the bank, it is sufficient to say that

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on the face of the books there was an apparent surplus which the plaintiff sought to convert into a deficiency by showing that various items were improperly credited as assets. It was proved that these notes or securities, while by their terms they were not in default with interest unpaid for over a year, were renewals of previous obligations, the original loans having been made in some cases as far back as six years prior to the time of the dividend, and that during such time neither interest nor principal had been paid except so far as the interest was included in the amount of the renewal notes, or in separate obligations. One class of notes had been renewed in this manner from six to twenty-three times. Among the assets of the bank were four notes of the St. Kivin Mining Company, aggregating \$93,181.92. The following is their history: On October 1, 1889, the mining company, a depositor with the bank, had overdrawn its account to the extent of nearly \$90,000. Interest was computed on this sum, and four notes were taken for the principal and the interest of the overdraft, and the overdraft marked paid. On March 12, 1890, two of these notes were marked paid, but no money was received by the bank. The account was adjusted by charging the amounts of the notes to the deposit account of the mining company as an overdraft. The overdraft was subsequently marked paid, but in fact was paid only by giving new notes. There were other transmutations in the form of this indebtedness prior to the declaration of the dividend, but nothing was paid on the debt, principal or interest from its original inception. The history of the other securities was of a similar character, payments being made thereon only by bookkeeping entries or by giving new obligations.

Under the statute (§ 26, chap. 689, Laws of 1892) all debts owing the bank which had remained due without prosecution, and upon which no interest had been paid for more than a year, or on which judgment had been recovered and remained for more than two years unsatisfied, were to be computed as losses. In the case in 16 Appellate Division (at p. 131) we held that where a new obligation was given by a new party for an old debt of another party, even though the new obligation included the arrears of interest accrued upon the old, the interest on the obligation was not unpaid within the meaning of the statute. We are not prepared to say that the same rule would not obtain, even where the new obligation is only



that of the original debtor. But Justice HATCH, in writing the opinion of the court in the case referred to, was careful to limit the rule to cases where renewals were discounted in the ordinary course of business, and where the contract was not renewed for the purpose of evading the statute. In the case then before us there was nothing to show that the renewal was not a fair ordinary business transaction. If a mercantile firm in good standing should obtain a line of discount with its deposit bank, we think it would be unreasonable to hold that it was in default as to the interest on its notes at one time because a critical examination or analysis of the account might show that at a later period its discounts with the bank were greater than the amount of the previous notes and the interest thereon. So, also, if one should obtain a loan on collateral where the value of the security far exceeded the amount of the loan, it would certainly be a fair business transaction to renew the note, with interest added, if the collaterals would still be reasonable security for the enhanced amount. We held that the form of the transaction was not controlling, but its substance. Ordinary course of business includes such loans as would ordinarily be made by an institution seeking to loan its funds that it might receive the interest thereon; not the taking of new obligations from insolvent debtors, or the carrying along of a bad debt in a new form. The evidence of the inception and subsequent history of the debts, represented by the securities we have spoken of, was sufficient to require at least the submission of the question to the jury, as one of fact, whether the notes had been taken in the due course of business, and whether the amounts of accrued interest included in the new notes were really loans of money such as would have been made apart from any prior relation of the debtors to the bank, or whether they were taken merely to cover defaulted debts. We are, therefore, of the opinion that the direction of the trial court dismissing the complaint was erroneous.

As the question will arise on another trial, we think that we should express our view concerning the competence of the evidence offered by the plaintiff as to the custom of extending discounts in other banks. We think the evidence was properly excluded, and that the character of these loans was to be determined by the jury, on proof of their history and the circumstances under which they were made

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and was not the subject of expert testimony as to the custom in other banking institutions.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

In the Matter of the Application of THE SCHOOL BOARD OF THE BOROUGH OF BROOKLYN, Respondent, for a Peremptory Writ of Mandamus against THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, THE SCHOOL BOARD OF THE BOROUGH OF MANHATTAN AND THE BRONX, THE SCHOOL BOARD OF THE BOROUGH OF QUEENS, and THE SCHOOL BOARD OF THE BOROUGH OF RICHMOND, Appellants.

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*Greater New York charter — the distribution of the general school funds by the board of education on July 1, 1898.*

Section 11 of chapter 878 of the Laws of 1897 (the Greater New York charter), requires a distribution of the general school funds by the board of education, upon the basis prescribed by section 1065 of the charter, to begin on July 1, 1898.

APPEAL by The Board of Education of the City of New York and others from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 25th day of October, 1898, granting the motion of the school board of the borough of Brooklyn that a peremptory writ of mandamus issue directing the board of education of the city of New York to forthwith apportion the general school fund among the several borough school boards of the said city, under and in pursuance and on the basis of section 1065 of the Greater New York charter.

*E. Ellery Anderson*, for the appellants.

*Ira Leo Bamberger* and *J. Edward Swanstrom*, for the respondent.

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WILLARD BARTLETT, J. :

The thorough and satisfactory discussion which this case received in the opinion of the learned judge who heard it at Special Term\* has left us little to do. In affirming the order appealed from, upon the grounds stated in that opinion, we deem it necessary

\*The following is the opinion of the Special Term referred to in the opinion:  
GAYNOR, J.:

This was an application of the School Board of the borough of Brooklyn for a peremptory writ of mandamus against the Board of Education of the city of New York, to require it to apportion the general school fund of the said city upon the ratio prescribed by section 1065 of the charter of the new city of New York.

In the Department of Education there is a Board of Education for the entire city, and a school board in each of the boroughs of the city, except that the boroughs of Manhattan and the Bronx are united under one school board. All moneys for school purposes in the city are to be apportioned and raised in two separate funds, called the special school fund and the general school fund. The former consists of moneys for the purchase of school sites, the erection and repair of buildings, the purchase of supplies, and the like; the latter consists almost entirely of moneys for salaries of teachers and all other employees. The yearly budget as prepared by the Board of Estimate and Apportionment, and confirmed by the Municipal Assembly, is required to exhibit each of these funds separated, and also to apportion the said special fund among the said boroughs, while the said general fund has to be raised in bulk and afterwards apportioned among the said borough school boards by the Board of Education upon the ratio of the number of teachers and the aggregate number of days of attendance of pupils under each borough school board. The special fund is administered by the Board of Education; the general fund by the borough school boards as so apportioned among them by the Board of Education.

The foregoing is the financial system of the Department of Education (City Charter, §§ 1037 to 1065). It is easy to see its application. The yearly budget having been made up and confirmed, such budget will show the said two funds separated, viz., the special school fund and the general school fund, and will also exhibit a division of the special fund among the boroughs, but not of the general fund. It will remain for the Board of Education to divide the said general fund among the borough school boards upon the ratio above mentioned.

The case at bar has to do only with a question of such division among the borough school boards of the said general fund by the Board of Education. It is claimed that such scheme of division does not become operative under the charter until the appropriations of the budget now being made up for 1899 come to be used, viz., on January 1, 1899; in other words, that it does not apply to the year 1898, and the present controversy is concerning the division of such general fund for the year 1898.

The new city came into existence on January 1, 1898. The moneys for the expenses of its government for the year 1898 were not appropriated by means of

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to add only one or two observations suggested by the oral argument of counsel in this branch of the court.

In behalf of the appellants, much emphasis is laid upon the injustice of distributing the general school fund at this time upon the basis prescribed by section 1065 of the Greater New York char-

a budget made up by the Board of Estimate and Apportionment and the Municipal Assembly. At their regular times in the year 1897 the several municipal corporations which were to be consolidated on January 1, 1898, to make the new city, made their regular appropriations and cast their regular annual taxes for the expenses of the coming year, 1898, by direction of the charter for the new city, which had already been passed (§ 10), just as though such consolidation was not to take place. On January 1, 1898, when the new city came into being, these several appropriations passed under its administration, the charter directing them to be used for the expenses of the new city for the year 1898 "in such manner as the board of estimate and apportionment for that year may determine;" and further providing by the next sentence that "it shall be the duty of the board of estimate and apportionment to apportion the said funds to the various city departments, as created by this act, so that such funds shall be used as nearly as may be for the objects for which they were raised" (§ 10).

Under this provision it was of course the duty of the Board of Estimate and Apportionment to apportion all of the school funds of 1898 to the Department of Education, and that was done. But by section 11 of the new charter the division of the said funds into the said special school fund and general school fund, in conformity with the aforesaid established financial system, was postponed until July 1, 1898. That section provides that on July 1, 1898, the Board of Estimate and Apportionment shall divide the residue or unexpended balances of such school funds into "the special school fund and the general school fund for the year eighteen hundred and ninety-eight, so that the schools of the city may begin in the autumn of the year eighteen hundred and ninety-eight to be conducted upon the basis of this division of funds, and in general, upon the system hereinafter prescribed in this act."

That system I have exhibited at the outset of this opinion, and, as has been seen, it embraces a requirement that the Board of Education shall apportion the general school fund among the borough school boards upon the ratio of the number of teachers and aggregate days of attendance of pupils under such borough boards. And the said section 11 continues and concludes as follows, viz.: "Up to July first, eighteen hundred and ninety-eight, the school money shall be spent as raised, for all school purposes, by the various school boards respectively. It shall be the duty of the board of education, as constituted under this act, to make all appointments therein provided for, and to adopt the necessary by-laws at such time and in such manner that the new system for the administration of the public schools of the city as provided by this act shall go into full effect on July first, eighteen hundred and ninety-eight." It would seem that this explicit provision that the new system should go into full effect on July 1, 1898, could not be made plainer.

ter,\* because it is said that although section 901 provides for a rectification of the inequalities between the several boroughs by means of the budget and tax levy of 1899, the teachers, janitors and clerks in the boroughs of Manhattan and the Bronx, Queens and Richmond will meantime be deprived of part of their salaries. Such a result, however, seems to be inevitable under the system of appor-

The Board of Estimate and Apportionment did, on July 1, 1898, divide the said unexpended balances of school funds into such special and general school funds, but the Board of Education has neglected to make the apportionment of the said general school fund among the borough school boards, and the school board of the borough of Brooklyn applies for a peremptory writ of mandamus to require it to do so. The reason assigned for its failure to make such apportionment is, that when, on July 1, 1898, the Board of Estimate and Apportionment divided the unexpended balances of school funds into the said special and general school funds, as aforesaid, and as required by the said section 11 of the charter, it at the same time not only apportioned among the several boroughs the special fund thus constituted, but also assumed to and did apportion the said general fund among the said borough school boards. It so apportioned the said general fund by allotting to each borough school board what remained unexpended of the sum appropriated as aforesaid for school purposes in the territory of such borough in 1897. By this apportionment the school board of the borough of Brooklyn was allotted over \$300,000 less than would be allotted to it under an apportionment of such general fund by the Board of Education upon the said ratio which it is required to adopt.

It seems to me that the said apportionment by the Board of Estimate and Apportionment was without authority and therefore a nullity. Section 11 of the charter, as has already been seen, specifically directed the Board of Estimate and Apportionment to divide the unexpended balances of school funds into a special school fund and a general school fund on July 1, 1898, "so that the schools of the city may begin in the autumn of the year eighteen hundred and ninety-eight to be conducted upon the basis of this division of funds, and in general upon the system hereinafter prescribed in this act;" and the words which follow these reiterate the purpose "that the new system for the administration of the public schools of the city as provided by this act shall go into full effect on July first, eighteen hundred and ninety-eight." An essential part of that system, as has been seen, is an apportionment of the general school fund among the borough school boards by the Board of Education upon the basis already mentioned.

It is contended that this explicit provision in section 11 to put the system of school administration prescribed by the charter into "full effect" upon and from July 1, 1898, is nullified in respect of such division of the general school fund by the Board of Education by the prior provision of section 10 already cited, viz., that the funds received from the superseded municipal corporations may be spent in 1898 "in such manner as the board of estimate and apportionment \* \* \*

\* Chap. 378, Laws of 1897.—[REP.]

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tioning the general school fund prescribed by section 1065 of the charter, so long as the conditions remain substantially the same in the respective boroughs, in regard to the number of qualified teachers and the aggregate number of days of attendance by the pupils. This is true whether it be held that the charter requires that apportionment to begin on July 1, 1898, or not until January 1, 1899.

may determine," and that "it shall be the duty of the board of estimate and apportionment to apportion the said funds to the various city departments as created by this act, so that such funds shall be used as nearly as may be, for the objects for which they were raised."

I see no conflict between these provisions of sections 10 and 11. The broad words of section 10, that such funds may be used for the expenses of the city government in such manner as the Board of Estimate and Apportionment may determine, are immediately limited by words making it the duty of the said board to apportion said funds among the departments to be used as nearly as may be for the objects for which they were raised. And then comes section 11 with its further special directions to the said board in respect of the administration of that part of the said funds which was raised for school purposes. All of these provisions construed together by no means leave the said board free to determine the use of the said funds as it sees fit, as might be the case if the first part of the said provision of section 10 stood alone.

Only teachers who alone, or adding their time of service to that of their lineal predecessors, shall have "taught in the schools under the charge of the board during a term of not less than thirty-two weeks," are counted in ascertaining the number of teachers in the borough for the purpose of such division of the general school fund (§ 1065). As thirty-two weeks could not elapse from February 1, 1898, when the Board of Education and the borough school boards came into authority (§ 1061), to July 1, when the general fund was constituted, it is argued that there were no teachers fulfilling the requirement, and that therefore such division was not contemplated for 1898. But the limitation is not to teachers who have taught thirty-two weeks under the borough boards, but to teachers who have taught that length of time in the schools now under the charge of the said boards. This relates back to and covers the time of the said schools under the government of the predecessors of the said boards.

It is said that as it would be unjust to the other boroughs to give to Brooklyn borough in 1898 more of the school funds than was raised in that borough in 1897, the makers of the charter and the Legislature could not have meant such a thing. But it will be seen that section 901 was framed in anticipation of such inequalities in the financial adjustments of 1898 in respect of the borough expenditures; and to prevent injustice resulting therefrom, the excess which any borough gets in that year is to be cast back upon it by means of the budget and tax levy of 1899, and by the same means the case of any borough which gets less than it was entitled to is to be adjusted.

The motion is granted.

If it appeared that the apportionment would produce evils, assuming the system to go into effect in July, 1898, but would produce no similar evils, assuming that it did not take effect until January, 1899, that fact would be a legitimate argument in favor of adopting the latter view in case the question was fairly debatable; but when we find that the unfortunate consequence is inherent in the system as applied to existing conditions, whenever that system shall take effect, we cannot recognize in it any reason for hesitating to permit the system to go into operation at once.

And that the Legislature intended to establish the new system complete on and after July 1, 1898, the language of the Greater New York charter leaves little room for doubt. Indeed, it is seldom that the legislative intent as to the time when a statutory change shall take effect is so clearly and unequivocally manifested as it is in this case. "The board of estimate and apportionment shall, out of the residue of the various funds raised for the support of the public schools of the different parts of the city during the year eighteen hundred and ninety-eight, constitute *from and after July first*, eighteen hundred and ninety-eight, the special school fund and the general school fund for the year eighteen hundred and ninety-eight, *so that the schools of the city may begin in the autumn of the year eighteen hundred and ninety-eight, to be conducted upon the basis of this division of funds, and in general, upon the system hereinafter prescribed in this act.*" (Greater New York Charter, Laws of 1897, chap. 378, § 11.) The division of funds thus mentioned is the division directed by section 1065 of the charter. This seems so plain that we should not be justified in adopting any other construction, even if the consequences involved greater inequalities in the receipts of the several boroughs than those which will actually ensue. The remedy for such results must be sought from the Legislature. Where the intention of the lawmakers can be ascertained as readily as it seems to be ascertainable in this case, the courts have only to declare it, and leave those whose interests demand different legislation to seek it from the law-making branch of the government.

The order appealed from should be affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

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In the Matter of the Application of DANIEL NOBLE.

JOHN H. SUTPHIN, Clerk of the County of Queens, Appellant;  
DANIEL NOBLE, Respondent.

*County of Nassau — section 5 of chapter 588, Laws of 1898, providing for a board of supervisors of that county, is constitutional — such board may meet as a board of canvassers prior to January 1, 1899 — the remedy to prevent names being put on ballots is by mandamus, not by order.*

The county of Nassau, created by chapter 588 of the Laws of 1898, containing the towns of Oyster Bay, North Hempstead and Hempstead, was intended to be constituted as a new county for the purposes of the general election held in November, 1898.

The provisions of section 5 of that act, directing that the board of supervisors of that county shall be composed of members who have been duly elected supervisors of the several towns which make up the new county, in the manner and for the period provided by law, are not unconstitutional. Although the board of supervisors is a county organization, its members are properly classed as town officers.

*It seems*, that the supervisors of such towns would constitute the board of supervisors of the new county, even were there no express enactment to that effect in the statute establishing the county.

Such board of supervisors of the new county came into existence prior to the 1st day of January, 1899, so far as related to the duties of the board in the canvassing of the votes cast at the general election in November, 1898, for which purpose the board had power to meet as a board of canvassers, as prescribed in the Election Law, in a place within the territory of the new county, as public as would have been the office of the county clerk had there been a county clerk of that county in existence, and it had power to select a secretary in the absence of such county clerk.

An order simply directing a county clerk to omit from the official ballots for certain towns of the new county the names of candidates nominated for county offices of another county is not warranted by section 88 of the Election Law (Chap. 909 of the Laws of 1896), but such order should provide for the issuance of a peremptory writ of mandamus.

APPEAL by John H. Sutphin, clerk of the county of Queens, from an order of the Supreme Court, made at the Kings County Special Term, bearing date the 22d day of October, 1898, and entered in the office of the clerk of the county of Queens, directing the said clerk, in preparing the ballots to be voted at the next general election in the towns of Oyster Bay, North Hempstead and Hempstead (being that part of the county of Queens constituting, or to constitute,



the new county of Nassau), to omit from such ballots the names of all candidates nominated for county offices of the said county of Queens.

*W. S. Cogswell* [*F. H. Van Vechten* and *A. N. Weller* with him on the brief], for the appellant.

*Henry A. Monfort*, for the respondent.

*Albert B. Boardman*, *amicus curiæ*.

WILLARD BARTLETT, J. :

The respondent Daniel Noble is the candidate of the Democratic party for surrogate of the county of Queens. By chapter 588 of the Laws of 1898 the Legislature provided for the erection of a new county, to be called the county of Nassau, from the territory comprised within the limits of the towns of Oyster Bay, North Hempstead and Hempstead, in Queens county. The act in express terms directs that at the general election of 1898 there shall be elected for said county of Nassau a county judge, a district attorney, a sheriff, a county clerk, a county treasurer and a county superintendent of the poor, and candidates for these offices have been regularly put in nomination. Mr. Noble learned from the county clerk of Queens county that, notwithstanding this legislation in respect to Nassau county, it was the intention of that officer in making up and printing the ballots for use at the coming general election in the three townships which constitute, or are to constitute, that county, "to include the names not only of all candidates nominated for county officers\* of said *new* county of Nassau, but also the names of all candidates nominated for county officers\* of the county of Queens." He thereupon applied at Special Term for an order or writ of peremptory mandamus directing the clerk to omit the names of the Queens county candidates for county offices from the official ballots to be prepared for voters in the Nassau county territory. His application was successful, resulting in the order from which the present appeal is taken.

The act to erect the county of Nassau became a law on April 27, 1898. The last section provides as follows: "This act shall take effect on the first day of January, eighteen hundred and ninety-nine, except as to such parts as are otherwise provided for, and as to

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such parts it shall take effect at the time or times in this act specified, and except also as to section four, and subdivision two of section fifteen, which shall take effect immediately."

Subdivision 2 of section 15 relates to the county buildings of Nassau county, and provides that the question of their location shall be voted upon by the electors of the towns of Oyster Bay, North Hempstead and Hempstead at the general election this year. By section 4 of the act, which also took effect immediately upon its approval by the Governor, it is provided: "All the county officers for the county of Nassau hereby erected, which are authorized by law, shall be elected at the general election of this state in eighteen hundred and ninety-eight." The final provision of the statute, above quoted, also gave effect at once to the direction to which I have already referred, found in section 3, that a county judge, district attorney, sheriff, county clerk, county treasurer and county superintendent of the poor for Nassau county shall be elected this year. Reading these various parts of the statute together, we entertain no doubt that the learned judge at Special Term is correct in his conclusion that their effect was at once to set up the towns of Oyster Bay, North Hempstead and Hempstead as a new county for the purpose of the approaching general election.

If this is so, it follows that in voting for county officers the electors in the territory of these three townships can be allowed to vote only for candidates to fill the county offices of the county of Nassau. It is unreasonable to suppose that the Legislature intended to empower an elector in the new county not only to take part in choosing the local officers of the county where he lives, but also to participate in the selection of such officers in another county of which he will be a non-resident after January 1, 1899. The language of the act, taken as a whole, negatives any such intention, and is rightly interpreted by Mr. Justice GAYNOR, when he says: "The electors of the new county by becoming such *ipso facto* cease to be electors of Queens county."

As against this construction of the statute, however, it is argued in behalf of the appellant that the entire enactment is invalid because its provisions in respect to the board of supervisors of Nassau county violate the requirement of the State Constitution

that there shall be in the several counties "a board of supervisors, to be composed of such members, and elected in such manner, and for such period, as is or may be provided by law." (Const. art. III, § 26.)

It is the 5th section of the act to which this destructive effect is attributed. That section reads as follows: "The supervisors of the said towns of Oyster Bay, North Hempstead and Hempstead, elected at the annual town meetings held in eighteen hundred and ninety-eight, shall constitute, and are hereby declared to constitute the board of supervisors of the said county of Nassau, with all the powers and privileges appertaining to such board, and shall hold their first annual meeting on the third day of January, eighteen hundred and ninety-nine, at the place where the public buildings for the said county of Nassau shall be located."

It was held below that, even if section 5 of the Nassau County Act were unconstitutional, the remainder of the act would not fall with it. But we think that the section is constitutional. It gives a board of supervisors to the new county. That board is composed of members who have been duly elected supervisors of the several towns which make up the new county, in the manner and for the period provided by law. This fulfills the mandate of the Constitution. Although the board of supervisors is a county organization, its members are not elected by the body of electors of the county, but are chosen by the electors of their several towns respectively, and individually they are classed as town officers. (Town Law,\* art. 4, § 12.) "The supervisors of the cities and towns in each county, when lawfully convened, shall be the board of supervisors of the county." (County Law,† § 10.) It might well be held that by force of this general provision of law the supervisors of Oyster Bay, North Hempstead and Hempstead would constitute the board of supervisors of the county of Nassau, even without any express enactment to that effect in the statute establishing the county. But in any event, the Nassau County Act leaves the three towns precisely in the same position, so far as their supervisors are concerned, as other rural townships throughout the State. Each town has its duly elected supervisor, who represents it as a member of the board of supervisors of the county in which the town is situated. It seems

\* Laws of 1890, chap. 589.—[REp.]

† Laws of 1892, chap. 686.—[REp.]

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to me that it would be difficult to contrive legislation more truly in accordance with the spirit of the constitutional provision relating to the establishment and election of boards of supervisors in the several counties of the State. The act does not undertake to appoint a board which the Constitution says must be elected, any more than does the County Law when it declares that the supervisors of the cities and towns in each county when lawfully convened shall be the board of supervisors of that county. It merely prescribes what town supervisors shall constitute the county board of supervisors, all of them being officers elected in their respective towns to act, not only in town affairs, but as members of the board of supervisors of the county to which the town belongs.

While holding that the Nassau County Act is constitutional, we do not decide that the board of supervisors of the new county comes into existence for all the purposes of that body prior to the 1st day of January, 1899. That it comes into existence for some purposes, however, seems reasonably clear. The manifest intent of the Legislature, as disclosed by the provisions relating to the election of county officers of the new county, was to enable the electors of the three townships comprised therein effectively to choose such county officers at the general election in 1898. To accomplish this result, it is necessary that the votes cast for such officers shall be duly canvassed. There is nothing in the statute directing that they be canvassed by the authorities in Queens county; and the fair implication from the provisions for the election of county officers for Nassau county this year (which took immediate effect) is that the election and canvassing machinery essential or appropriate to render the election effective is to be established in the new county now. To this end the board of supervisors of the new county should meet as a board of canvassers as prescribed in the Election Law and proceed to canvass the votes in accordance with the requirements of that statute. (Election Law,\* § 130 *et seq.*) It is true that, at the time fixed for such canvass, the supervisors cannot meet at the office of the county clerk, for Nassau county will not yet have any county clerk; and for the same reason the county clerk or his deputy cannot act as the secretary of the board of canvassers. In the absence of any clerk's office, it will, doubtless, be sufficient if the

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\* Laws of 1896, chap. 909.—[REP.

canvass be made at an equally public place within the territory of the new county. As to the secretary, the supervisors themselves may choose one. (*People ex rel. Daley v. Rice*, 129 N. Y. 449, 456.) "If the county clerk do not appear, and if his deputy be also absent," said PECKHAM, J., in the case cited, "I have no doubt of the power of the board to appoint a secretary in their place to perform the duties which appertain to that office. \* \* \* In such cases the power to appoint exists as an inherent power of the board to canvass and certify its work."

While the court at Special Term disposed of the application as a motion for a peremptory writ of mandamus, no such writ appears to have been granted, but an order was entered simply directing the county clerk to omit from the official ballots for the towns of Oyster Bay, North Hempstead and Hempstead the names of all candidates nominated for county officers of Queens county. We infer from the brief of respondent's counsel that he supposed this form of order to be warranted by section 88 of the Election Law. It seems to us, however, that the provisions of that section have no application to a case like the present, but relate only to actual errors or omissions already made in the preparation of the ballots before the proceeding is commenced. In affirming the conclusions of the court below, therefore, we must modify the form of the order so that it shall provide for the issuance of a peremptory writ of mandamus.

All concurred.

Order modified so as to direct that a peremptory writ of mandamus issue to the appellant, commanding him, in preparing the ballots to be voted at the next general election in the towns of Oyster Bay, North Hempstead and Hempstead, to omit therefrom the names of all candidates for county offices of the county of Queens, and the designations of such offices; and as thus modified, order affirmed, without costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM W. MERSHON, Relator, v. DANIEL A. SHAW, as President, and GEORGE H. BROUWER and Others, as Trustees of the Village of Sea Cliff, and Constituting the Board of Trustees Thereof, Respondents.

*Village — street closing proceeding — an adjudication signed by the trustees when the board of trustees was not in session, and afterwards placed upon its minutes, is invalid — review of the alleged adjudication by certiorari — who is an aggrieved party entitled to the writ.*

The trustees of a village can only act in proceedings to close a portion of a village street, instituted under sections 145, 146 and 147 of the Village Law (Chap. 414 of the Laws of 1897), at a session of the board.

Where the records of the board of trustees of the village do not show that the board, as such, has ever arrived at any determination with reference to the discontinuance of a street, but simply that there was placed on the minutes a paper purporting to be such a determination, which had been previously signed by the members of the board at a time when the board was not in session, and when no meeting thereof was held, the adjudication contemplated by the statute is not shown, and the proceeding has no validity or force.

The action of the board, in assuming to make a determination to discontinue a street under such provisions of the Village Law, is judicial in its character and is, therefore, reviewable by certiorari.

A person who is deprived, by the discontinuance of the street, of the only direct way to reach the shore of a harbor, which is about two blocks distant from his dwelling, and is thereby "compelled to make a considerable detour to the north in order to reach the same, and by reason thereof he is put to great inconvenience and the value of his property is materially lessened," is a party aggrieved by the determination and is entitled to review the same by certiorari.

It is not necessary, in order to make him a party aggrieved, that the action of the village board should be such as to entitle him to maintain an action for damages.

CERTIORARI issued out of the Supreme Court and attested on the 1st day of March, 1898, directed to Daniel A. Shaw, as president, and George H. Brouwer and others, as trustees, constituting the board of trustees of the village of Sea Cliff, in the county of Queens, commanding them to certify and return to the office of the clerk of the county of Queens all and singular their proceedings in reference to the application to close a portion of Dayton street in the village of Sea Cliff.

*Henry A. Monfort*, for the relator.

*Townsend Scudder*, for the respondents.

WILLARD BARTLETT, J. :

According to the allegations of the petition, the relator is the owner of a dwelling house, in which he resides, located upon a lot belonging to him on Dayton street in the village of Sea Cliff one block to the east of that portion of the street which the board of trustees of the village have undertaken to close by the proceedings brought up for review by this writ. Those proceedings were instituted under sections 145, 146 and 147 of the Village Law (Laws of 1897, chap. 414). Section 145 provides that five resident freeholders may present to the board of trustees a petition for laying out, altering, widening, narrowing or discontinuing a street in a village, and prescribes what facts must be stated in such petition. Section 146 directs that, upon the presentation thereof, the board shall immediately give notice that it will meet at a specified time and place, not less than ten nor more than twenty days from the date of such notice, to consider the petition. In the case of the proposed discontinuance of a street the notice is required to be served upon each owner of land adjoining the street proposed to be discontinued, "and also upon the owner of land otherwise affected by the proposed discontinuance." Section 147 requires the board to meet, at the time and place specified in the notice, to consider the petition and also any objections thereto; and further provides as follows: "The board may adjourn the hearing and must determine the matter within twenty days from the date fixed for such hearing. If the board determine to grant the petition, an order must be entered in its minutes containing a description of the land, if any, to be taken."

In the present case the minutes of the board of trustees of the village of Sea Cliff, which are set out in the return to the writ of certiorari, show that a petition of five resident freeholders for the discontinuance of that part of Dayton street west of Locust place was received at a meeting of the board held on October 13, 1897. The minutes also show that the board then ordered the publication and posting of a notice to the effect that the board would meet in its room on October 27, 1897, at nine o'clock in the evening to consider said petition. The minutes of a meeting held on October

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20, 1897, state that the clerk reported the posting of the notice in five public places and the advertisement thereof in a Sea Cliff newspaper. They also state: "The above notice was served by the clerk on John T. Pirie, Samuel Stenson, D. W. Pardee, C. S. Dunning and William Mershon," the last named being the relator. The time when such service was made, however, is not specified. The minutes of the meeting appointed for the hearing, on October 27, 1897, set out at length a letter received by the board in opposition to the proposed discontinuance of the part of Dayton street in question and state that the relator appeared before the board and opposed the projected closing of that portion of the street. According to the minutes, the hearing was then adjourned, but not to any specified time or place.

The next extract from the minutes which we find in the return relates to a meeting held on November 20, 1897. From this it appears that on that date the board ordered to be placed on the minutes the following entry relative to the closing of Dayton street, west of Locust place:

"The following determination was filed with the Village Clerk, Nov. 16, '97:

"In the matter of the application to close that portion of Dayton St., lying west of Locust Place.

"The hearing in this matter having been duly held at the Village Board Room, pursuant to the notice issued therein, and of the statute in such case made and provided, on the 27th day of Oct. 1897, and after due consideration and deliberation, we determine that the said petition shall be granted, and do hereby grant the same, and order that that portion of Dayton St., lying west of Locust Place, be discontinued.

"Dated at Sea Cliff, L. I., *November 15th, '97.*

"(Signed) D. A. SHAW, *President.*

"GEO. A. BROUWER,

"C. SACKETT CHELLBORG, } *Trustees.*

"CHANCY COOMBS,

"Filed *Nov. 16, 1897.*

"(Signed) C. SACKETT CHELLBORG, *Acting Clerk.*"

No further or other order or determination in the matter of the proposed discontinuance of the portion of Dayton street west of



Locust place is set out or mentioned in the return, which purports to state all of the proceedings of the board of trustees in that matter.

We agree with the learned counsel for the relator that this was not such a determination as the statute requires, and that it is to be regarded as in effect no determination at all. The determination purports to have been made on November 15, 1897. No meeting of the board of trustees, however, was appointed to be held or appears to have been held on that day. The clerk of each village is made by statute the clerk of the board of trustees and it is his duty to keep a record of their proceedings. (Laws of 1897, chap. 414, § 82.) If there was a meeting at which the alleged determination was made, the presumption is that it would have been recorded and the record would now be before us. But no valid determination could be made except at a meeting of the board as such. The law takes no account of what the trustees may individually agree upon outside. As was said in an Ohio case, where a prior agreement of the members of a school board to award a certain contract was pronounced void: "The board is constituted, by statute, a body politic and corporate in law, and as such is invested with certain corporate powers, and charged with the performance of certain public duties. These powers are to be exercised, and these duties discharged, in the mode prescribed by law. The members composing the board have no power to act as a board, except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for the purpose, all their official proceedings. \* \* \* The public, for whom they act, have the right to their best judgment, after free and full discussion and consultation among themselves of, and upon, the public matters intrusted to them, *in the session provided for by the statute.*" (*McCortle v. Bates*, 29 Ohio St. 419.)

The records of the board of trustees of the village of Sea Cliff show, not that the board, as such, ever arrived at any determination with reference to the discontinuance of Dayton street, but that a paper was placed on the minutes purporting to be such a determination, previously signed by the members at a time when the board was not in session and when no meeting thereof was held. This is not the adjudication contemplated by the statute, and it has no validity or force.

The action of the board in assuming to make a determination to discontinue a street under the provisions of the Village Law is judicial in its character, and is, therefore, reviewable by certiorari. (*Starr v. Trustees of Rochester*, 6 Wend. 564.) The proceedings under examination in the case cited were for the widening of a street in a village, and the old Supreme Court said: "There can be no doubt that a certiorari properly lies in this case, directed to the trustees." A proceeding to discontinue a street seems to be as judicial in its nature as a proceeding to widen one, and the section of the Village Law under which it is instituted (§ 145) classifies the laying out, altering, widening, narrowing or discontinuing of streets altogether. The statute prescribes that proceedings for any of these changes which may be proposed shall be instituted by a petition, which shall be considered at a hearing to be given by the board at a meeting of that body, which is enjoined to "determine the matter" within a specified time. These provisions import judicial action. They deal with the exercise of a power quite different from that whereby the board of trustees of a village enacts village ordinances. The authority of the board in this respect is defined in another part of the Village Law. (§§ 89 to 93, inclusive.) It is clearly legislative, and was evidently what the Court of Appeals had in mind in the passage quoted in the defendants' brief from *The People ex rel. Trustees of Jamaica v. Board of Supervisors of Queens Co.* (131 N. Y. 468), where EARL, Ch. J., said that if the action of the supervisors in passing an act providing for the grading, regulating and macadamizing certain streets could be reviewed by certiorari, then "every ordinance and resolution of a village board of trustees" could be so reviewed. The court certainly did not mean by this language to deny the applicability of the writ to the review of a determination by a village board in a proceeding which is plainly of a judicial character.

But it is objected in behalf of the defendants that the relator has not shown himself to be an aggrieved person by the determination sought to be reviewed, in such a sense as to entitle him to relief by certiorari. In his petition, the relator alleges that by the proposed discontinuance of Dayton street he is deprived of the only direct way to reach the shore of Hempstead harbor, which is but about two

blocks distant from his dwelling, and that he "is compelled to make a considerable detour to the north in order to reach the same, and by reason thereof he is put to great inconvenience, and the value of his property is materially lessened." Assuming the truth of these statements, I think that the relator was an owner of land affected by the proposed discontinuance, within the meaning of section 146 of the Village Law. To bring him in the category of landowners thus affected it was not necessary that the action of the village board in deciding to close, and in closing, the street should be such as would entitle him to maintain an action for damages. It was enough that the discontinuance would work injury to him in fact, as by reducing the value of his neighboring property. This gave him the right to notice of the proceeding, which the board of trustees recognized, and this gives him the requisite status to review the board's action by writ of certiorari.

The alleged determination of the defendants should be annulled, with costs.

All concurred; CULLEN, J., in result.

Determination annulled, with ten dollars costs and disbursements.

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GEORGE HEIBERGER, Respondent, v. HELEN JOHNSON, Appellant.

*Contract to pay for "placing" a loan — the expense of searching the title is not covered by the word "placing" — expert testimony as to its meaning.*

In a contract, by which an owner of property agrees to pay a certain sum to a broker for "placing" a loan thereon, the word "placing" refers merely to the obtaining of the loan, and, if not otherwise qualified, imports nothing, one way or the other, as to the payment of the expense of searching the title to the property upon which the loan is to be made.

The use of the word "place" in reference to loans is too familiar to warrant or require the admission of expert testimony to explain its meaning.

APPEAL by the defendant, Helen Johnson, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 23d day of April, 1898, upon the verdict of a jury, and also from an order entered in said

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clerk's office on the 29th day of April, 1898, denying the defendant's motion for a new trial made upon the minutes.

*Theodore B. Gates*, for the appellant.

*William J. Courtney*, for the respondent.

WILLARD BARTLETT, J. :

The defendant signed and delivered a contract in the form of a letter agreeing to give the plaintiff, who was a real estate broker, \$400 for "placing" a loan of \$10,000 upon certain specified property. According to her testimony, which was corroborated by that of her husband, the defendant asked her husband at the time when the letter was signed whether the \$400 was to cover all the expenses of the loan, and her husband, in the presence of the plaintiff, who said nothing, answered that it was. The plaintiff denied that any such conversation or acquiescence on his part ever took place. The jury believed him, and as the proof was clear that he had obtained the desired loan for the defendant, they gave him a verdict for \$300, the defendant having already paid \$100 of his claim.

The principal contention in behalf of the appellant in this court is that to "place" a loan means not only to procure the specified amount upon the security of the particular real estate offered, but also to pay the expense of searching the title to satisfy the lender that it is good. In support of this view, the defendant called as a witness on the trial a person employed in the loan department of a real estate broker's office in Brooklyn, and inquired of him what was meant by the phrase, "I will give you \$400 for placing the loan of \$10,000." The trial judge sustained the plaintiff's objection to this question and the defendant excepted.

The exception is not well taken. To place a loan means merely to obtain it, and the phrase, if not otherwise qualified, imports nothing one way or the other as to the payment of the expenses of searching the title to the property upon which the loan is to be made. The defendant evidently realized this when offering her evidence that it was qualified in this case by the plaintiff's tacit assent to her husband's statement that the \$400 was to cover all the expenses; but, as already intimated, the jury could not have believed that any such assent was given. The use of the word "place" in

reference to loans is too familiar to warrant or require the admission of expert testimony to explain its meaning. In the Century Dictionary we find the verb, in this usage, defined thus: "*Place*. 6. To arrange or make provision for; as to *place* a loan;" while the Standard Dictionary gives this definition: "*Place*. 3. To dispose or arrange as an investment; put out at interest; take insurance for; invest; as, to *place* a loan; to *place* a risk."

The learned trial court was as liberal toward the defendant as the rules of evidence required in allowing her to testify to what was said at the time she signed the written contract, and no error was committed in refusing to go further and permit her to show how some other real estate dealer would have understood what she wrote.

The case upon all the evidence presented a question of fact for the jury which they have decided against the defendant, and with this result we find nothing in the record which justifies our interference.

All concurred.

Judgment and order affirmed, with costs.

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THERESA KELLY and JENNIE A. McNALLY, Respondents, v. MARTHA E. WERNER and Others, Defendants.

THE EMERALD AND PHOENIX BREWING COMPANY, Assignee, Appellant; ELIZABETH SUPPLE, Purchaser, Respondent.

*Partition — an interlocutory judgment should provide for an apparent existing lien — the question as to who was the judgment debtor will not be determined on affidavits — who is not a bona fide purchaser.*

In an action for the partition of land, in which the complaint averred that the share of one of the parties was subject to the lien of a judgment in favor of another party thereto, an answer, served by a company claiming to be the assignee of the judgment (although the assignment did not appear of record), was returned by the plaintiff upon the ground that the company was not a party to the action, and an interlocutory judgment was subsequently entered, excluding the judgment as a lien and making no provision for its payment.

*Held*, that such interlocutory judgment was in direct violation of the provisions of section 1563 of the Code of Civil Procedure, and that the assignee was entitled to have it set aside upon motion;

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That, assuming that affidavits might be filed after the entry of the interlocutory judgment to cure the irregularity existing therein, the affidavit of the alleged judgment debtor, showing that he was not the party defendant in the action in which the judgment in question was obtained, was not available in support of such interlocutory judgment, where such affidavit was repudiated by the affiant, who claimed that he never made it, and he was supported in this respect by another affiant, as, under such circumstances, the question should not be determined upon affidavits;

That, as the irregularity in the interlocutory judgment appeared upon the face of the proceedings, a purchaser of the property at the sale had under such judgment did not stand in the position of a *bona fide* purchaser for value, nor was she entitled to protection as such.

APPEAL by The Emerald and Phoenix Brewing Company of New York, assignee of the defendants Thomas C. Lyman and Henry L. Greenman, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 27th day of May, 1898, denying its motion to vacate and set aside the interlocutory judgment of partition and sale entered in said clerk's office on the 24th day of August, 1897, and the proceedings thereunder, as irregular and void.

*Isaac N. Miller*, for the appellant.

*William H. Stockwell*, for the purchaser, respondent.

*William S. Haskell*, for plaintiff respondents.

HATCH, J. :

This was an action brought to partition certain lands. In the complaint it was averred that the share of Martha E. Werner in the real estate sought to be partitioned was subject to the lien of a certain judgment rendered against William C. Williams, a grantor of Martha E. Werner, in favor of Thomas C. Lyman and Henry L. Greenman. The last-named persons were made parties defendant in the action, and made default in the service of an answer. The Emerald and Phoenix Brewing Company claimed to be the assignee of this judgment, and through its attorney served a verified answer setting up its ownership of the judgment. This answer was returned by the plaintiffs upon the ground that the brewing company was not a party to the action. No other pleading representing this judgment interest was served, and the answer

returned was retained by the brewing company. Upon application to the court for an interlocutory judgment a search of the premises, then in the possession of the plaintiffs, disclosed the existence of the judgment as a lien. The assignment to the brewing company did not appear of record. There was no change in these facts when the court granted the application for judgment, and nothing then appeared which in the slightest impaired the existence of the judgment as a valid lien. On the contrary, it stood entitled to protection as a subsisting lien in the judgment authorized to be entered. The judgment as entered did not protect, but excluded it as a lien, and made no provision for paying into court from the proceeds of the sale a sum sufficient to discharge it. The interlocutory judgment was, therefore, in direct violation of the provisions of section 1563 of the Code of Civil Procedure, which requires such provision. As a judgment in partition is conclusive upon all parties to the action (*Jordan v. Van Epps*, 85 N. Y. 427; Code Civ. Proc. § 1557) it became essential that this judgment should be protected in this action or be forever cut off as a lien upon the premises. The interlocutory judgment as entered was, therefore, irregular, and upon motion made in due time is required to be set aside as a matter of right. The affidavit of Williams, subsequently obtained, showing that he was not the party defendant in the action in which the judgment was obtained, cannot avail the plaintiffs in the present condition of this case. Assuming that such affidavits may be subsequently filed to cure irregularity in entering the interlocutory judgment, yet the moving papers disclose that Williams repudiates such affidavit, claiming that he never made it; and in this respect he is supported by another affiant. Under such circumstances, as the irregularity stands confessed, we ought not to try this question now upon affidavits, or cut off this judgment upon doubtful proof, where the proceedings show that it should have been cared for when the interlocutory judgment was entered. The purchaser, however, claims that she stands in the position of a *bona fide* purchaser for value, and is, therefore, entitled to protection. We do not think this claim can be sustained. The defect appeared upon the face of the proceedings. As we have seen, the judgment was averred in the complaint as a lien; a search of the premises showed it so existing;

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there was no proof to impair it, and the interlocutory judgment, although reciting that Lyman and Greenman were judgment creditors, excluded it from participation in the proceeds of the property. Of these things the purchaser was bound to take notice, and they established that the entry of the interlocutory judgment was irregular in this respect and might become subject of attack.

It is further urged that the brewing company has no standing to make this motion. We think otherwise. The plaintiffs had notice of the claim of the company, and the answer served set up that the judgment had been assigned to it. This answer is verified, and the fact is not disputed by any proof. The brewing company, therefore, succeeded to all of the rights possessed by the judgment creditors for the enforcement of the judgment. They would have standing to make the motion, and we think the company now, as the real party in interest, has the same rights which they would have possessed.

Our conclusion is that, while the order should be reversed and the motion granted, the order to be entered should require restitution by Martha E. Werner of the money representing the share she obtained from Williams, or the whole purchase price, as the purchaser shall elect.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, without costs. Order to be settled before HATCH, J.

DANIEL HASSEN, Respondent, v. NASSAU ELECTRIC RAILROAD  
COMPANY, Appellant.

*Negligence — a passenger standing upon the running board of a street car injured because of a sudden jerk — liability of the railroad company.*

A passenger upon an open electric car, which was crowded to such an extent that all the seats were occupied, and passengers were standing in the space between the seats and upon the running board, took a position upon the running board, as was customary upon the railroad in question when the cars were crowded, although he might have stood in the space between the seats. The conductor collected his fare and made no suggestion that it was improper or dangerous

84	71
44	614
46	239
84	71
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84	71
f 78	*477



for the passenger to ride upon the running board, and while the car was running at the rate of from six to eight miles per hour the passenger was thrown from the car and injured because of a sudden violent jerk, which the evidence, in an action brought against the railroad company by such injured passenger, justified the jury in finding might have been occasioned by the sudden application of the motive power.

*Held*, that the question whether the passenger was guilty of contributory negligence in remaining upon the running board was one of fact for the jury;

That the jury were justified in determining that the jerk given the car was the result of a negligent act.

APPEAL by the defendant, the Nassau Electric Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 9th day of March, 1898, upon the verdict of a jury for \$1,250, and also from an order entered in said clerk's office on the 2d day of March, 1898, denying the defendant's motion for a new trial made upon the minutes.

*Henry Yonge* [*Clarence J. Shearn* with him on the brief], for the appellant.

*James C. Cropsey*, for the respondent.

HATCH, J.:

The plaintiff boarded the defendant's car at Coney Island for the purpose of being transported to the borough of Brooklyn. The car was an open car, with seats running across and a running board upon the side. It was very much crowded, having from seventy to ninety passengers; all of the seats were filled, and people were standing in the space between the seats, and also upon the running board. There was space between the seats unoccupied when plaintiff boarded, and he could have occupied such space within the car. He remained upon the running board, as did also several other passengers. His right so to remain was not questioned by the conductor of the car, nor was any request made by the conductor or by any other person that he occupy the space between the seats. On the contrary, the conductor demanded and received the plaintiff's fare, and made no suggestion that it was an improper or dangerous place for him to ride. It is customary for passengers upon this line, when the cars are crowded, to stand upon the running board of the car. While rid-

ing in this position, and when the car was running at about six or eight miles an hour, it gave a sudden violent jerk, which the jury were authorized to find was occasioned<sup>4</sup> by the sudden application of excessive motive power by the motorman. The sudden and violent character of the jerk caused the plaintiff to lose his hold with the left hand upon the stanchion of the car, and his body to swing outward, in which position his head was brought in contact with a trolley pole at the side of the track, inflicting the injuries of which complaint is made.

It is contended by the defendant that the plaintiff was guilty of negligence as matter of law; that if he could, with slight inconvenience to himself, procure standing room between the seats of the car, he was bound so to do, and as it was conceded that there was such space, the plaintiff must be deemed to have voluntarily remained in a place of danger, which defeats his right to recover. This question was raised by motion for a nonsuit and in the requests to charge. It may be conceded that a person would be chargeable with contributory negligence, in the ordinary operation of a car, if he stood upon a running board when he might obtain a safe place within the body of the car. But, under the circumstances of this case, we think that such proposition may not be affirmed as matter of law. It is well known that the space between these seats, when the latter are occupied, is quite narrow; with small people upon a seat, the space left might be occupied, with more or less inconvenience; with large people it may become a matter of extreme difficulty to stand in the space, and with some an impossibility. In all cases it is a place of discomfort, and disagreeable both to the person standing and to those sitting. The cars running from Coney Island to Brooklyn, at most times, are crowded within and without in all available space. The defendant expects that this will be so; and if it does not invite, it makes little effort, if any, to prevent such condition, and collects and receives fares from those sitting and those standing, indifferent as to the place where the passenger secures his foothold. Under such circumstances we think the question becomes one of fact to be determined by the jury, having regard to particular conditions. (*Bruno v. Brooklyn City R. R. Co.*, 5 Misc. Rep. 327; affirmed, 147 N. Y. 711; *Wood v. Brooklyn City R. R. Co.*, 5

App. Div. 492.) The court charged the jury in accordance with this view of the law, and upon the evidence we think the submission was proper.

The defendant was properly found guilty of negligence upon the testimony. Such finding was warranted by the evidence with regard to the sudden and violent starting of the car, which is shown to have disturbed the equilibrium of other passengers as well as that of the plaintiff. The defendant had accepted the plaintiff for carriage, it collected his fare and knew the place he occupied upon the car. It was bound to know that the application of motive power in such manner as to cause the car to give a violent jerk was extremely hazardous, in view of the position of many of the passengers upon the car, and might result in injury. The jury were, therefore, authorized to say that it was a negligent act. (*Dochtermann v. Brooklyn Heights R. R. Co.*, 32 App. Div. 13; *Schaefer v. Union Ry. Co.*, 29 id. 261.)

Upon the question of the extent of plaintiff's injuries the testimony was conflicting, and while it is not as satisfactory as it should be, we are unable to find legal ground for disturbing the judgment.

No other questions require attention.

The judgment should be affirmed.

WOODWARD, J., absent.

Judgment and order unanimously affirmed, with costs.

ROSE T. O'FLAHERTY, Respondent, v. NASSAU ELECTRIC RAILROAD COMPANY, Appellant.

*Negligence — presumption of negligence from the fall of a trolley wire into the street — proof by interested witnesses of the use of proper materials — automatic device not in working order — injury from fright.*

In an action brought to recover damages for injuries sustained by a person who, while passing along a street, received a shock of electricity from a trolley wire, used in connection with the defendant's electric railroad, which broke and fell to the ground and the current from which twice shocked her person, proof by the defendant which, in addition to establishing the use of proper material and care in construction, showed that it had a system of inspection under which its

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160a	672
34	74
57	128
a165a	624

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34	74
64	155

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72	1458
34	74
82	1535
82	1564
82	1565

trolley wire and the supports were carefully examined at least once in every four days, and, in addition thereto, that the wire which broke and the supports in connection therewith were inspected the day before the wire broke and found to be in perfect order, does not overcome the presumption of negligence created by the falling of the wire: *First*, where such proof rests for its support upon the testimony of interested witnesses, charged by the railroad company with the discharge of these duties, and, *second*, where it appears that the company employed a device, called a breaker system, which, when properly constructed and in proper working order, would throw the current off the wire the moment it came in contact with the ground, as the jury would be authorized to find that this automatic device at the time of the accident was either not properly adjusted or was not in proper working order.

While injuries resulting from fright alone do not authorize a recovery, yet where physical injury accompanies the fright it furnishes a basis for a recovery.

APPEAL by the defendant, the Nassau Electric Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 25th day of April, 1898, upon the verdict of a jury for \$7,500, and also from an order entered in said clerk's office on the 17th day of May, 1898, denying the defendant's motion for a new trial made upon the minutes.

*Clarence J. Shearn* [*Henry Yonge* with him on the brief], for the appellant.

*Thomas E. Pearsall*, for the respondent.

HATCH, J.:

Although the record in this case is somewhat voluminous, in its disposition but little discussion is required. It is undisputed that the defendant's trolley wire broke, and one end of the broken piece fell to the ground. The plaintiff, at the time when the wire broke, was passing along the street, as was lawfully her right; and at about the time the wire fell she was in its immediate vicinity. The evidence satisfactorily discloses that she received a shock of electricity sufficiently violent to throw her to the ground, and that upon regaining her feet she was again shocked and was again thrown down. While much argument by the appellant is devoted to showing that the plaintiff was not in the vicinity where the wire grounded, yet plaintiff's testimony was that something struck her upon the back; that she received a shock, and the testimony of an

eye-witness was that the wire was near her when it fell. That she was thrown down twice is not disputed, and it was for the jury to say whether her fall was occasioned by electrical shock. Measurements and statements of witnesses as to particular places where the wire struck or remained upon the ground is not conclusive. It is not entirely clear from the testimony whether she received the shock by coming in contact with the wire, or whether she occupied such a position as caused her body to form a circuit through which the electricity, flowing from the broken wire, or some part of it, passed. Either conclusion, we think, is permissible from the testimony.

The injuries which the plaintiff thus received were serious and, as the evidence tended to establish, permanent in character. While it is true that injuries arising from fright alone do not authorize a recovery, yet, where there is physical injury accompanying fright, it furnishes basis for a recovery of damage. Here the jury were authorized to find the existence of electrical shock and fright produced by it, the whole causing plaintiff's present condition. The falling of the trolley wire into the street raised a presumption of negligence on the part of the defendant, and in the absence of contributory negligence, as to which no claim was made that it existed, created a liability for the injuries thus sustained, unless the defendant satisfactorily explained the conditions so as to overcome the presumption of negligence which thus arose. (*Jones v. Union Railway Co.*, 18 App. Div. 267.) The defendant claims that by its proof it successfully met the presumption, and established by conclusive evidence that it was without fault. In this regard it is contended that its evidence established that it used, in the construction of its trolley wire, and the supports for the same, such material as is commonly in use for such purpose, and the best which the market affords; and that its method of construction and supports was in accordance with the best plan which practical use has demonstrated to be proper.

It is also contended by the defendant that, in addition to thus establishing the use of proper material and care in construction, it had a system of inspection under which its trolley wire and the supports were carefully examined at least once in every four days; and in addition thereto that the wire which broke, and the supports in

connection therewith, were inspected the day before the wire broke, and found to be in perfect order.

We think there are two considerations appearing in the testimony, which answer this claim. The system of inspection which the defendant claims to have existed rests for its support upon the testimony of interested witnesses, charged with the duty of discharging this obligation. Under well-settled rules, therefore, this testimony was that of interested persons, who had, or might have, a motive for shielding themselves from blame. Under such circumstances their credibility was involved, and became a question to be determined by the jury. (*Volkmar v. M. R. Co.*, 134 N. Y. 418.)

In addition to this, it was disclosed by the testimony that the defendant employed a device called the breaker system, which, when properly constructed and in proper working order, would throw the current off the wire the moment it came in contact with the ground. This device was explained by Professor Sheldon, an expert witness called by the plaintiff, whose testimony upon this subject is adopted by the defendant as correct. This witness testified that this breaker would have the effect claimed for it if it was properly adjusted.

As we have before observed, the jury were authorized to find that the plaintiff received her injuries by reason of the passage through her body of the current of electricity coming from the ground after the same had escaped thereto from the broken wire. Upon this subject Professor Sheldon said: "The trolley wire and the system of feeders constitute a good conductor; the rail and the supplementary conductors for return also constitute a good conductor; the wire striking the ground, as between it and the rail, between its terminal and the rail, a fairly large resistance, if the human body, through the shoes, through the feet, should be interposed between those two points, the rail and wire — the wire should strike the ground — the human body offering resistance about the same as that of the earth would divide the current with the earth in returning it to the rail." The jury were, therefore, authorized upon this testimony to find that the automatic device was either not properly adjusted, or was not in proper working order; for had it operated properly the current would have been immediately cut off, and thus none passed through the body; whereas it continued to escape

for a period long enough to twice shock the person. Under such circumstances the jury were permitted to find that the condition of the wire and its appliances was not consistent with the testimony of the defendant, and, therefrom conclude that the defendant was guilty of negligence in not discharging its duty. (*Scherer v. Holly Manufacturing Co.*, 86 Hun, 37.) It follows, therefore, that this claim of the defendant may not be sustained.

Nor do we think that error was committed in permitting the witness King to testify as to the permanent character of the plaintiff's injuries. He was not called for the purpose of testifying whether such condition as he found present when he made his examination was the result of the injuries alleged to have been received; consequently, a history of the case had little or no bearing as forming a basis for the expression of his opinion. He detailed at length all of the conditions which he found present, and these conditions evidently formed the basis from which he reached his conclusion. The case is, therefore, different from *Connelly v. Manhattan Railway Co.* (60 Hun, 495) and *Page v. Mayor* (32 N. Y. St. Repr. 563). In each of those cases the inquiry was directed to whether the existing condition might have been produced by the injury, while in the present case the inquiry was, would her present condition be permanent or not. A history of the case was, therefore, not essential, and the witness stated fully the conditions which he found. In *People v. McElvaine* (121 N. Y. 250) the question was somewhat different. There the issue was as to the sanity of the defendant at the time of the commission of the crime, and the witness was permitted to answer without disclosing the facts upon which he based his conclusion. It is apparent that such case has no application to the present one.

In addition to this, the defendant has not raised the question which it seeks to present. No objection was made to the statement that he "got a history of the case," or to the question which produced such answer. The objection interposed was upon the ground of incompetency; while the exception presents the additional ground that it is incompetent and immaterial. The testimony was competent, because directed to her existing condition, and the witness was competent to testify as he had qualified as an expert. The testimony was material. No suggestion appears in this objection

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that the witness was not disclosing the facts upon which he based his opinion, and the court was left clearly in the dark, as we should now be except for the insistence of counsel that the point as now urged was intended to be presented. This point, even if good, which it is not, would not now be available.

It follows that the judgment should be affirmed, with costs.

Judgment and order unanimously affirmed, with costs.

In the Matter of the Application of JAMES NORTON.

JAMES NORTON, Appellant; JOHN H. SUTPHIN, Clerk of the County of Queens, Respondent.

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158a	130
84	79
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*Certificate of nomination for State Senator — when it may be filed under section 59 of the Election Law — distinguished from acts affecting the rights of third parties.*

A candidate for State Senator is entitled at any hour of the day, "at least twenty-five days prior to the holding of the election," to file with the clerk of the county a certificate of nomination for that office, and the delivery of such a certificate to the clerk, between the hours of ten and eleven in the night of the last day on which such certificate could be lawfully filed, is sufficient under the provisions of section 59 of the Election Law (Chap. 909 of the Laws of 1896).

The certificate need not be filed within the hours during which the clerk is required, by statute, to keep his office open for the transaction of public business.

The distinction between the construction to be given to a law which creates an involuntary lien and fixes the rights of third parties affected thereby, and one which seeks a method of procedure by which the nomination of candidates for office is evidenced, considered.

APPEAL by the applicant, James Norton, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 24th day of October, 1898, denying said applicant's motion for an order requiring the clerk of the county of Queens to accept and file, as of October 14, 1898, the certificate of nomination of the applicant as a candidate for the office of Senator in the second senatorial district.



*Henry A. Monfort*, for the appellant.

*F. H. Van Vechten*, for the respondent.

HATCH, J. :

The moving papers show that the petitioner was duly nominated by a convention of the Democratic party, assembled for that purpose, as a candidate for State Senator in the second senatorial district of this State, to be voted for at the coming general election to be held on the eighth day of November then next ensuing. The county of Queens constitutes said senatorial district. Section 58 of the General Election Law (Laws of 1896, chap. 909) requires that a certificate of nomination for this office shall "be filed with the clerk of the county in which" the electors voted for such candidate. The certificate is required to be filed with the county clerk at least twenty-five days prior to the holding of the election. (Election Law, § 59.) The last day on which petitioner's certificate could be lawfully filed was the 14th day of October, 1898. Upon the night of this day, between the hours of ten and eleven, petitioner's certificate, certified in all respects as required by law, was presented to the acting clerk of Queens county, who refused to receive or file the same. This refusal has been sustained by the court below upon the ground that as the county clerk was required by law to file such certificate, he could only comply with such provision when at his office, where the law requires the clerk to keep his books and files and to receive and file such papers. The County Law requires that county clerks, between the thirtieth day of September and the first day of April, shall keep their offices open for the transaction of public business from nine o'clock in the forenoon to five o'clock in the afternoon, except upon Sundays and holidays or half-holidays. (Laws of 1892, chap. 686, § 165.) It is argued, therefore, that as this certificate was presented after the hour for closing his office, he could not lawfully receive and file the same, and, therefore, the attempt to file was inoperative.

The statute does not make the act of keeping open the clerk's office, after or before the hours mentioned therein, unlawful; it simply fixes the hours in the day when it shall be open for the transaction of public business. What effect an official act of the clerk would have when done after the closing or before the opening hour,

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if done at his office, in all cases, it is not necessary to determine in this proceeding. It was held in *Hathaway v. Howell* (54 N. Y. 97, relied upon to support the determination below) that leaving a judgment roll with the clerk, after the closing of the office, did not constitute the same a valid judgment as of the time of delivery, but that it became operative upon the following business morning when the clerk opened the office. It is, however, to be observed that judgments are required to be docketed in books kept for that purpose, and cannot become effective until received at the clerk's office where such books are kept. In cases of this class, the docketing of judgments, recording of mortgages and other similar acts are required, not alone for the protection of the parties whose interest it is to have them recorded or docketed, but it also affects, or may affect, the rights of third parties, as the act of record determines their status, and the necessary steps to insure a lien are required by positive law. As applied to this case, no such question can arise. The filing of this certificate in nowise affected the property interest of third parties, or in anywise affected their legal right in respect thereto. The purpose of the statute is to require the filing to evidence the action of the convention and enable the clerk to make up and properly certify the ticket. The voters have a special interest in having what was done properly evidenced, in order that they may not be deprived of the privilege of exercising the franchise in favor of a person representing their views, which their delegated authority has selected. There is, therefore, quite a radical difference in reason between a law which creates an involuntary lien and fixes the rights of third parties affected thereby, and one which seeks a method of procedure by which the nomination of candidates is evidenced, the elective franchise made secure, and the fullest scope permissible given to its exercise. As we have seen, the Election Law gave to the petitioner the whole day of the fourteenth of October in which to file his certificate. This contemplated a day of twenty-four hours. Such are the terms of the Statutory Construction Law (Laws of 1892, chap. 677, § 27, as amended by chap. 447, Laws of 1894). It is quite apparent, therefore, that if the petitioner must have filed the certificate before the clerk's office closed upon this last day, his right to a full day of

twenty-four hours is abridged. There ought to be no abridgment of his clear legal right in this respect unless it be worked by clear legal authority. The language of the statute is, "shall be filed with the clerk." A compliance with the letter of the statute is had when the paper is placed in the possession of the clerk, wherever he may be. His office is not mentioned, although the office is mentioned in connection with the filing in Fulton and Hamilton counties. As to all other offices therein mentioned, the statute is satisfied upon filing with the respective officers. It is many times found necessary in order to uphold a given act, where appeals in its favor are based either upon public or private good, to interpret a statute against its strict letter and in accordance with its spirit in order that justice may be accomplished. We have, therefore, little difficulty in reconciling an adoption of the letter of the statute when by so doing is enhanced the public good. In the present case, it is for the interest of the voters in this senatorial district to have an opportunity to vote for the candidates who have been properly selected. Limitations upon the exercise of such right are not favored. The whole scheme of the Election Law at bottom is to secure to the voter the right to vote for the candidate of his choice, and to have the vote thus given honestly counted and returned. This right should not be restricted by the removal of candidates from a ticket, any more than in preventing the voter from depositing his ballot. Both are entitled to the same measure of protection, and where the statute may be satisfied and both privileges secured by fair construction, it is the duty of the court to adopt such construction. In the present case, in order to secure to the petitioner his full legal right, and to give to the voters the opportunity to vote for the candidates of their choice, we think that however technical may be the meaning which attaches to the word "file," it must be held to be satisfied when the certificate is left with the clerk, and that such act satisfied the requirements of the statute as to filing with him.

This view is confirmed by the customary practice of the Secretary of State, and other persons and bodies required to receive certificates of this character, who keep their respective offices open until midnight of the last day for filing certificates, in order that all legal rights may be preserved. This practice is commendable. But whether it be adopted or not, we think the statute is satisfied when

the certificate is given to the clerk, and as it is then within the legal right of the party so to deliver it, it must be regarded as a filing within the meaning of this statute. The statute in question admits of different interpretations, and no censure can attach to the clerk for interpreting the statute as he did.

The order should be reversed, and the motion granted.

All concurred.

Order reversed and application granted, without costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. MEDICAL SOCIETY  
OF THE COUNTY OF KINGS, Respondent, v. BARZILLAI G. NEFF  
and Others, Constituting the Board of Assessors of the City of  
Brooklyn, Appellants.

84	83
e 74	559

*Taxation — medical society organized under chapter 94 of the Laws of 1813 — it is not exempt from taxation under chapter 498 of the Laws of 1893.*

A medical society, organized under chapter 94 of the Laws of 1813, entitled "An act to incorporate medical societies, for the purpose of regulating the practice of physic and surgery in this State," which maintains a medical library open to the public, and furnishes rooms for the meeting of medical or charitable societies — being, in effect, a medical club house where the members of the medical profession meet for "mental improvement," and such incidental benefits as flow from an association and co-operation of effort — and which alleges that it has "established, in the city of Brooklyn, an organization for mental improvement and for certain educational and charitable purposes," unaccompanied by any further allegation, and fails to allege that it is organized for the exclusive purpose of carrying out any of these objects, and makes no claim that the purpose of the society is to improve the morals of either men or women, or that it is for religious, missionary, hospital, patriotic, historical or cemetery purposes, is not entitled to exemption from the payment of taxes under the provisions of chapter 498 of the Laws of 1893.

APPEAL by the defendants, Barzillai G. Neff and others, constituting the board of assessors of the city of Brooklyn, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 15th day of March, 1898, granting the relator's motion for a peremptory writ of mandamus commanding the defendants to cancel all taxes

levied and imposed for the years 1893, 1894, 1895, 1896 and 1897, upon property owned by the relator.

*Almet F. Jenks*, for the appellants.

*Jesse W. Johnson*, for the respondent.

WOODWARD, J.:

The relator, the Medical Society of the County of Kings, seeks to be relieved of the duty of paying taxes upon certain property situated at 356 Bridge street, borough of Brooklyn, under the provisions of chapter 498 of the Laws of 1893. For this purpose it petitioned the Supreme Court in this department, praying for a peremptory writ of mandamus to the assessors of the city of Brooklyn, directing them to cancel the taxes levied against the relator in the years 1893, 1894, 1895, 1896 and 1897. This writ was granted, and from the order granting the same appeal comes to this court.

Section 1 of chapter 498 of the Laws of 1893 provides that "The real property of a corporation or association organized exclusively for the moral and mental improvement of men and women or for religious, charitable, missionary, hospital, educational, patriotic, historical or cemetery purposes, or for two or more of such purposes, and used exclusively for carrying out thereupon one or more of such purposes, shall be exempt from taxation." I shall assume, for the purposes of this discussion, that the assessors have the power to cancel the taxes levied, and that mandamus was the proper remedy to invoke, and will simply inquire whether the facts set forth in the petition of the relator are sufficient to bring it within the provisions of this statute.

The petition recites that the petitioner is duly organized under the provisions of chapter 94 of the Laws of 1813, entitled "An act to incorporate medical societies for the purpose of regulating the practice of physic and surgery in this State;" that it has "established in the city of Brooklyn an organization for mental improvement and for certain educational and charitable purposes;" that "such society maintains a public medical library and a free public medical reading room, both open to the public every day in the year, Sundays and holidays excepted; maintains an auditorium in which are regularly held medical meetings where papers of interest

to the medical fraternity in general, and which are prepared for the purpose of furthering the science of medicine, are presented and discussed. The society offers its rooms to, and seven separate and distinct medical societies regularly meet in and use such rooms, for all of which no money is asked or paid. The staff association of the Kings County Medical Hospital, a charitable organization, regularly meets here; the Alumni Association of St. Mary's Hospital meets there. No member of this society receives any salary or compensation whatever." The petition further recites that the president of the society acts in an advisory character to the mayor and commissioners of health in case of epidemic, and that its committee on hygiene makes suggestions, and that it affords a place for the meeting of the national, medical and public health societies, and that it has no source of income except such as is derived from the annual dues of the members. It is further alleged that the society "maintains a directory for nurses and makes no charge therefor, excepting such charge as is sufficient to cover the expenses of maintaining the same," and that "this society also maintains a medical journal, the organ of the society, from which no income is derived." The remaining allegations relate to the location of the property, etc., and have no bearing upon the question involved in the present proceeding.

I am unable to see how the relator comes within the provisions of the statute. Exemptions from taxation are not favored; the theory of the law is that all property shall pay its just proportion of the public burdens, and it is only in those cases where the property is put to some use calculated to minimize the expenses of government that public policy justifies an exemption. There are no presumptions in favor of an exemption of property of any kind, and the burden of establishing the right is upon the person claiming such exemption.

Chapter 498 of the Laws of 1893, under which the relator claims an exemption, so far as requisite, has been already set out.

The petitioner avers that it "was duly organized," and that it "has established in the city of Brooklyn an organization for mental improvement and for certain educational and charitable purposes." This is most commendable in the gentlemen making up the Medical Society of the County of Kings, but it does not entitle them to exemption from taxation under the laws of this State. There is no

allegation that the society is organized for the exclusive purpose of carrying out any of these objects, and, if there was, it would still fall short of the requirements. The statute demands that the association shall be organized not only for mental, but for moral improvement, and it requires, moreover, that it shall be for the "moral and mental improvement of men and women." This is not alleged. There is no claim that the purpose of this society is to improve the morals of either men or women, or that it is for religious, missionary, hospital, patriotic, historical or cemetery purposes. The general law (1 R. S. pt. 1, chap. 13, tit. 1, § 4, subd. 3), as amended in 1883 (Chap. 397), exempts "every building erected for the use of a college, incorporated academy or other seminary of learning, and in actual use for either of such purposes, every building for public worship," etc. The Consolidation Act (Laws of 1882, chap. 410, § 827) makes these provisions inapplicable to any such building for public worship, and any such school house or other seminary of learning in the city of New York, "unless the same shall be exclusively used for such purposes, and exclusively the property of a religious society." The Young Men's Christian Association of New York sought to have its property on the Bowery, known as the Bowery Institute, exempted from taxation under this act, and the court held that while it might not be impossible to characterize the association as a religious society, it was not entitled to exemption because it did not appear that the building was "exclusively used for purposes of public worship, or exclusively used for those of a seminary of learning." Commenting upon this case (*Young Men's Christian Assn. of N. Y. v. Mayor*, 113 N. Y. 187), the court say: "Unless, therefore, it can be truthfully and correctly said that its building is exclusively used for purposes of public worship, it can have no exemption from taxation upon its Bowery Institute. There is no ambiguity in the phrase 'public worship.' It refers to the usual church services upon the Sabbath, open freely to the public, and in which any one may join. (*Assn. for Colored Orphans v. Mayor, etc.*, 104 N. Y. 581.) There are such services held in the building of the association, but in comparison with the other uses to which that building is put they are the least of all, not, perhaps, in their importance, but in the time which they occupy and the proportion of the building

which they require. At all events, it cannot be properly said, upon the facts disclosed, that the building is used exclusively for purposes of public worship. Associations of this character are so useful and so deserving of encouragement and support that a different result would please us better, but we are unable to reach it under the law as it stands" This opinion of the court was rendered in 1889, and in 1893 we find the statute broadened in its scope to exempt corporations and associations "organized exclusively for the moral and mental improvement of men and women," which is the work undertaken by the Young Men's Christian Association. Clearly, then, the allegation of the society that it has an organization for "mental improvement" does not bring it within the contemplation of the statute.

But the society is likewise maintaining an organization "for certain educational and charitable purposes." Under this head we are told that it maintains an auditorium, etc., but it nowhere appears, either, that these are educational or charitable within the meaning of the statute, or that the society is organized exclusively for the purpose of carrying out one or more of these objects. As was said in *Coe v. Washington Mills* (149 Mass. 543): "It was a voluntary association for the mutual benefit of its members, and cannot be held to be a public charitable institution. To constitute a public charity, there must be an absolute gift to a charitable use for the benefit of the public." No such condition prevails in the relator society. It was organized under the provisions of a law which distinctly declares the object for which it was created. It was "an act to incorporate medical societies, for the purpose of regulating the practice of physic." That was the object for which it was created, and under the provisions of the act these medical societies were authorized to accumulate medical libraries, and to become auxiliaries to the Medical Society of the State of New York, which organization, in common with the county branches, has established rules and regulations, many of them being enacted into the statute law of the State, for the practice of physic and surgery. These rules and regulations, and laws which have been enacted upon the suggestion of the Medical Society of the State of New York, have had for their object, at least incidentally, the welfare of the membership of these societies and their individual members as practicing physicians. For many years,



and until comparatively recent times, membership in these county societies was made compulsory, the license of the individual to practice his profession depending upon such membership. (2 R. S. [7th ed.] 1092, pt. 1, chap. 14, tit. VII, § 1.) The fact that the medical library of the relator may be open to the public, or that it may furnish rooms for the meeting of medical or charitable societies, has no possible bearing upon the case. "Assuming for the sake of argument," say the court in the case of *Donnelly v. Boston Catholic Cemetery* (146 Mass. 163), "that it would have no right to declare dividends to its members in case of realizing profits, there is nothing in the charter which compels the application of any part of its funds to charitable uses. \* \* \* The fact that the funds received were actually applied to a considerable extent in charity, is no more material than evidence of a similar application of a part of his income by a private citizen would be in a suit against him." This was an action for damages against a cemetery association, in which the defendant sought to be exempted from damages on the ground that it was a charitable organization. The court made the test, not whether the funds were actually used for charitable purposes, but whether the charter of the defendant compelled it to make such use of its funds; and this is clearly the rule which should be applied to the application of the relator for exemption from taxation on the grounds either of charity or education. There is nothing in the statute under which the relator is organized which compels it to keep its medical library or its reading room open to the public. In fact, it may be fairly questioned whether the public, outside of the comparatively small number of physicians and surgeons, with their students, have any interest in such a library or reading room, while the fact that those rooms are open to the meetings of other medical societies, made up, for the most part, no doubt, of the members of the relator, serves no purpose of society in general which entitles it to immunity from taxation.

In other words, the Medical Society of the County of Kings is performing no service of a character calculated to relieve the burdens of government more than a thousand other mutual associations or corporations, designed for the promotion of the individual development of its members. It is, therefore, entitled to none of the exemp-

tions which are extended to corporations or associations which are devoted exclusively to the "moral and mental improvement of men and women," or to "religious, charitable, missionary, hospital, educational, patriotic, historical or cemetery purposes." It is, in effect, a medical club house, where the members of a single profession meet for "mental improvement" and such incidental benefits as flow from association and co-operation of effort. One of the results of these medical societies has been to establish a practically uniform rate of charges, or at least to establish a minimum rate, and to afford a degree of protection to individual practitioners which would be practically impossible without an organization empowered to enforce obedience to by-laws and respect for professional ethics. It is not necessary to ascribe selfish motives, and it is undoubtedly true that the relator is performing many charitable and commendable acts, in common with mankind in every walk of life; but this is not, of itself, a justification for the State's relieving it of the burdens which are common to good citizenship generally; and, accepting the relator's own statement of the case, there are no facts to bring it within the provisions of the law. The relator was not organized "exclusively" for the purpose of carrying out any of the lines of work enumerated in the statute, or any two or more of such objects. It makes no such claim in its moving papers, and it was error, therefore, for the court to grant the order appealed from.

The order should be reversed, with costs.

All concurred.

Order reversed, with ten dollars costs and disbursements, and application denied, with ten dollars costs.

MUTUAL BENEFIT LOAN AND BUILDING COMPANY, Appellant, v.  
MARY E. JAEGER, Respondent, Impleaded with LOUIS SUTTER.

*Mortgage foreclosure—when a clause relating to a default is not to be construed as governed by chapter 475, Laws of 1890—conclusion of law considered as a finding of fact.*

Where the record in an action brought to foreclose a mortgage, given to a mutual loan and building company, does not show that a clause in the mortgage, which relates to a default in the making of monthly payments and provides for the service of a notice and demand, either personally or by mail, after which the whole principal sum and interest shall be payable, was drawn with respect to the provisions of the "Act to provide for short forms of deeds and mortgages" (Chap. 475, Laws of 1890), the specific clause contained in the mortgage is not to be construed under the provisions of that chapter, especially where the plaintiff in the complaint itself construes such provision of the mortgage as not coming within that act.

Circumstances under which a conclusion of law in the report of a referee that the defendant was not in default at the time of the commencement of the action will be deemed on appeal to have been a finding of fact, considered.

APPEAL by the plaintiff, the Mutual Benefit Loan and Building Company, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Queens on the 29th day of June, 1898, upon the report of a referee.

*William F. Wyckoff*, for the appellant.

*Paul E. De Fere*, for the respondent.

WOODWARD, J. :

We are unable to find anything in the record of the case now before us to warrant a reversal of the judgment entered in the above-entitled action.

The plaintiff, the Mutual Benefit Loan and Building Company, is the owner of a certain bond and mortgage given to secure the payment of \$300, together with a second mortgage for the sum of \$1,500, and this action was brought for the purpose of foreclosing the mortgage. The case was sent to a referee to hear and determine the issues, and the appeal comes to this court on the exceptions to "the ruling of the referee upon questions of law." The appellant has made no case, and as the evidence taken before the referee is not before us, we

must assume the facts to be as found by the referee. He finds, as matters of fact, that the defendant Mary E. Jaeger, on or about April 8, 1896, made and executed the mortgage involved in this action, and that the same was duly recorded; that said mortgage was in the usual form of a building and loan association mortgage, and that it contained a specific clause that "after default in the payment of said monthly payments of eighteen (18) dollars per month for six months, or of any taxes or assessments for sixty days, after notice and demand, such notice and demand to be made either by personal service of a written or printed notice and demand upon the grantor or by mailing a written or printed notice or demand in a sealed wrapper, postage prepaid, directed to the grantor at her last post office address as furnished by the grantor to the grantee or its attorney at law, then shall be payable thereon the sum of eighteen hundred dollars and interest, together with such other sums as may be due under rules, conditions and by-laws mentioned in said bond," etc.; that the plaintiff attempted to give the notice and demand "provided by the mortgage and alleged in the complaint" by mailing a certain notice to the husband of the defendant Jaeger, and that no notice and demand was ever given by the plaintiff to the defendant Jaeger prior to the beginning of this action.

The referee then finds, as conclusions of law, that "the defendant Jaeger was not in default at the commencement of this action; that the complaint herein should be dismissed; that the defendant Jaeger is entitled to judgment herein dismissing the complaint, with costs, and I direct judgment to be entered accordingly."

It is urged on behalf of the appellant that the specific clause of the mortgage above set out is to be construed under the provisions of chapter 475 of the Laws of 1890, which provides: "The words, 'And it is hereby expressly agreed that the whole of the said principal sum shall become due at the option of said mortgagee or obligee after default in the payment of interest for ——— days, or after default in the payment of any tax or assessment for ——— days after notice and demand,' shall be construed as meaning, and it is hereby expressly agreed, that should any default be made in the payment of the said interest, or of any part thereof on any day whereon the same is made payable as above expressed, or should any tax or assessment, which now is or may be hereafter imposed upon the

premises hereinafter described, become due or payable, and should the said interest remain unpaid and in arrear for the space of ——— days, or such tax or assessment remain unpaid and in arrear for ——— days after written notice by the mortgagee or obligee, his executors, administrators, successors or assigns, that such tax or assessment is unpaid, and demand for the payment thereof, then and from thenceforth, that is to say, after the lapse of either one of said periods, as the case may be, the aforesaid principal sum” shall become due.

Chapter 475 of the Laws of 1890 is entitled “An act to provide for short forms of deeds and mortgages,” and by section 6 of this act it is provided that “The schedules hereto annexed contain forms of instruments such as are authorized by this act, and shall be taken as a part thereof, but nothing herein contained shall invalidate or prevent the use of other forms.” Schedule C provides the short form of mortgage, and in this schedule is found the language “and it is hereby expressly agreed that the whole of said principal sum,” etc., as quoted above. It is apparent, then, that the language of the provision relied upon by the appellant relates to the clause found in Schedule C, and is not to furnish the construction for mortgages not made in contemplation of this act. There is nothing in the record to show that the clause in the mortgage now under consideration was drawn with respect to the provisions of the “act to provide for short forms of deeds and mortgages,” and in the absence of such facts there is no reason why the court should quarrel with the conclusion of the referee that “the defendant Jaeger was not in default at the commencement of this action.” The appellant, in its complaint, construed the provision of its own written instrument. After setting forth the specific clause already quoted, the complaint avers that “the defendant Mary E. Jaeger has failed to comply with the conditions of said bond and mortgage by omitting and refusing to pay the sum of eight and 50-100 dollars, the balance of the monthly premium which became due and payable on the 1st day of December, 1896, upon her nine shares of class ‘B’ stock of the said plaintiff company, although notice has been given, and demand made for the payment of the same.” This indicates clearly the view which the plaintiff took of the language of the mortgage, and as the instrument was written in behalf of the plaintiff it is proper that

the defendants should be given that construction which is accepted by the plaintiff and which is most favorable to the defendants.

There is another view of this question. The defendant Jaeger, in a motion to open the judgment originally taken by default, alleges that the \$300 mentioned in the mortgage was not a loan to her; that it was a sum which the plaintiff was authorized to use in making certain improvements upon the mortgaged property, which improvements were either not made, or not made to an extent which would exhaust the fund, and that if the proper credit were given her on account of her shares she would not be in default. The answer put in was a general denial of the facts alleged in the complaint, and, in the absence of the evidence taken before the referee, this court is justified in assuming that the first conclusion of law is rather a finding of fact, and that the defendant Jaeger was not, as a matter of fact, in default at the time of the commencement of this action.

In the case of *Travis v. Travis* (122 N. Y. 449) the court say: "The claim that findings of fact appear under the head of conclusions of law in the report of the referee, and that the exceptions thereto gave the General Term power to review the facts, is not well founded. An inspection of the report shows that certain facts, found as such in the body of the report, are alluded to in the conclusions of law in order to make plain the application of the law thereto. They are not excepted to as findings of fact, but as conclusions of law, *eo nomine*. As found under the head of matters of fact, they are not excepted to at all. The only exceptions taken are to the first, second, etc., conclusion of law and to each and every part thereof. Hence, the exceptions did not operate as notice to the successful party that the appellant intended to insist that such facts, thus incidentally recited, had no evidence to support them, or place upon him the responsibility of adding by amendment any evidence upon the question that had been omitted from the proposed case."

In the case of *Sherman v. Hudson River Railroad Co.* (64 N. Y. 254) the court say: "The referee does not expressly find, as matter of fact, that the defendant was guilty of negligence — that is, there is not such a finding among the findings of fact. But among the conclusions of law there is a finding that the defendant was guilty of negligence, and if an express finding of fact that the defendant was thus guilty were necessary to uphold this judgment, this would

be deemed sufficient. A finding of negligence is, generally, an inference from many facts — from all the evidence in the case; and when it is found in the report of a referee, no matter where it is placed, it must be deemed his inference from all the evidence submitted to him upon the question.”

So in the *Matter of Clark* (119 N. Y. 427) the court say: “When the referee says, in his second conclusion of law, that the funds ‘are presumed’ to have come into the possession of Mrs. Clark, he evidently means that he draws that inference, and that such possession by her is a fact which flows from the proof, and, while he might have stated it more precisely and accurately, I think it fairly states the fact. That he placed it among his conclusions of law does not deprive it of its force.” The General Term of the fifth department held the same doctrine in the case of *Evans v. Howell* (58 N. Y. St. Repr. 670).

This being the law of the case, and the referee having found, as a matter of fact, that the defendant Jaeger was not in default at the time this action was brought, this court is not prepared, in the absence of the testimony taken at the trial, to say that this conclusion was not justified by the evidence.

It follows that the judgment should be affirmed, with costs.

All concurred.

CULLEN, J.:

I am in favor of the affirmance of this judgment, and concur in the view expressed by Mr. Justice WOODWARD as to the construction of the covenant under which the plaintiff claims the option of declaring the whole principal sum due. But, to use the judicial vernacular of the day, I think the question is “academic.” The mortgage was given to secure the payment of monthly installments to become due upon certain shares of the plaintiff’s stock as well as other debts. The complaint alleges that the defendant Jaeger has made default in the mortgage by failing to pay the sum of eight dollars and fifty cents monthly premium due on the 1st day of December, 1896. If the said defendant did make this default this action was properly brought, and upon the right to maintain it the question of whether the whole principal sum had become due or only the eight dollars and fifty cents, is immaterial. If the defendant

Jaeger was in default as to the payment of eight dollars and fifty cents, the judgment appealed from was erroneous. But the defendant in her answer denied all default, and the referee has not found any. We must, therefore, assume that the allegation that defendant has made default in the payment of the sum of eight dollars and fifty cents which became due on December 1, 1896, was unproved. It follows that on the record before us the judgment of the referee was correct. It may be that if the appellant had printed the evidence in the case instead of the affidavits in proceedings on a motion to open the default previously taken in the cause, which have no possible bearing on the subject before us, the result of this appeal might be different.

BARTLETT, J., concurred.

Judgment affirmed, with costs.

CHARAC J. VAN INWEGEN, Respondent, v. PORT JERVIS, MONTICELLO AND NEW YORK RAILROAD COMPANY, Appellant. (Actions 1 and 2.)

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41	628
34	95
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*Negligence — evidence of ownership of premises set on fire by sparks from a locomotive.*

In an action commenced in 1896 to recover damages resulting from a fire on the plaintiff's premises, alleged to have been kindled by sparks emitted from the defendant's (a railroad company's) engine, the jury may properly conclude that the property in question belonged in fact to the plaintiff, where he produces deeds dated in 1878, 1880 and 1882, and gives evidence disclosing facts indicating ownership reaching back to about the time that the deeds were executed, and where the property was inclosed by fences.

APPEAL by the Port Jervis, Monticello and New York Railroad Company, the defendant in the above-entitled actions, from judgments of the Supreme Court in favor of the plaintiff in said actions, entered in the office of the clerk of the county of Orange on the 18th day of January, 1897, upon the verdict of a jury for \$1,300 in the first action, and for \$300 in the second action, and also from orders entered in said clerk's office on the 20th day of January, 1897, denying the defendant's motion for a new trial of each of said actions, made upon the minutes.

Action No. 1 was commenced on the 5th day of August, 1896, and action No. 2 on the 9th day of October, 1896.



*Schuyler C. Carlton*, for the appellant.

*C. E. Cuddeback*, for the respondent.

WOODWARD, J. :

TWO actions involving the same questions of law are involved in these appeals, both cases being contained in a single record. The plaintiff is the owner of certain wood lands in the town of Deer Park, Orange county, and was the owner of such property during the year 1896, at which time the cause of action arose. In that year the defendant railroad company operated its trains over the Port Jervis, Monticello and New York railroad. In the month of May, after a prolonged drought, a fast train was put upon the line, and in passing over the road on the fourth day of that month the engine in use emitted sparks to an extent which caused a fire to be kindled upon the right of way of the defendant company, and this fire was communicated by means of the dry brush, weeds, etc., which the defendant had allowed to accumulate upon its premises, to the adjoining property, and thence, by a continuous and uninterrupted combustion of dry leaves, brush, weeds, etc., to the premises of the plaintiff, whose property sustained the damages complained of in the destruction of his growing timber, the burning of the soil, and the demolition of some 200 cords of wood which he had cut and ranked ready for the market. The complaint alleges the ownership of the property, and charges the defendant with negligence, both in the construction and operation of the engine which caused the fire, and in maintaining its roadway in such a condition as to make the communication of fire a necessary consequence of the negligent scattering of sparks from the engine. The defense alleged a lack of knowledge or information sufficient to form a belief, and, therefore, denied the several allegations of the complaint. The case was tried without exceptions worthy of serious consideration, and the questions of fact were submitted to the jury under a charge which left the defendant little, if anything, to complain of, and resulted in a verdict of \$1,200 for damages to the real estate, and \$300 for the destruction of the cord wood.

The defendant now urges that, under the authority of *Miller v. Long Island R. R. Co.* (71 N. Y. 380), the plaintiff did not sufficiently establish his ownership of the property in question by the

introduction of the title deeds and the declaration under oath that he was the owner of the property. The trial proceeded upon the presumption of ownership, the defendant not raising the question in any form except by the general denial. Without considering whether the defendant has the right to urge this objection at this time, it is proper to say that the case cited could not, in our judgment, be of avail to the defendant under the circumstances of the case at bar. The language of the court, which is submitted in support of the defendant's contention, does not deal with an analogous case. There, the plaintiffs had taken an assignment of a number of claims in which some of them did not show paper titles or any acts indicating possession, and it was in reference to these facts that the court say: "The plaintiffs could prove their titles, either by conveyances showing paper title or by such possession as would be presumptive evidence of title. When reliance is placed solely upon paper title, the land not having been occupied, improved or inclosed, the proof must be of a chain of title from the original patentee or donee. A deed from a person not in possession, or not shown to be the owner, establishes no title. (*Gardner v. Hart*, 1 N. Y. 528.) The possession, unaccompanied with paper title, requisite to furnish the presumption of ownership sufficient to maintain this action, must be actual; nothing less will answer. When lands are unoccupied, unimproved and uninclosed, it is quite difficult to make out such possession." In the case at bar the plaintiff produced a paper title. These deeds were dated in 1878, 1880 and 1882. The evidence disclosed facts indicating ownership reaching back to about the time the deeds were executed, and the property was inclosed by fences; and we see no reason why the jury may not have properly concluded that the property under consideration did, in fact, belong to the plaintiff. The other questions raised on the appeal appear to us to be peculiarly within the province of the jury.

We are forced to conclude that the judgment appealed from should be affirmed.

All concurred.

Judgments and orders affirmed, with costs.

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ADOLPH KOELESCH and GEORGE OERTEL, Respondents, v. THE CITY  
OF NEW YORK, Appellant.

*Municipal corporation — payment of warrants of the general improvement commission of Long Island City refused, because of lack of funds — liability of the city of New York to an action for the amount thereof — construction of statutes.*

Where warrants of the general improvement commission of Long Island City, presented on December 31, 1897, were refused payment because the city, which had issued only \$1,255,000 of the \$1,500,000 of bonds authorized to be issued for that purpose, then had no funds available for the payment of the warrants, an action for the amount of such warrants may be maintained against the city of New York, which on January 1, 1898, became, by virtue of chapter 378 of the Laws of 1897, the successor of Long Island City.

The court will not so construe a statute as to bring it into conflict with the Constitution either of the State of New York or of the United States, in their provisions relating to the obligations of contracts.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Queens on the 6th day of July, 1898, upon the decision of the court rendered after a trial at the Queens County Trial Term before the court without a jury.

*Almet F. Jenks*, for the appellant.

*Hector M. Hitchings*, for the respondents.

WOODWARD, J.:

We are unable to discover any good reason for disturbing the judgment entered in the above-entitled action against the defendant. The trial court finds that the "plaintiffs, at the times mentioned in the complaint, were and are co-partners; that the defendant the City of New York is a domestic municipal corporation, and that up to January 1, 1898, defendant Long Island City was a domestic municipal corporation; that during the year 1897 the general improvement commission of Long Island City was a duly organized board of said Long Island City, and that a majority of such board had full power and authority to purchase supplies for the work of said board, and, with the approval of the mayor, to issue warrants upon the city treasurer of Long Island City in payment thereof; that prior to the 31st day of December, 1897, said general improve-

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ment commission purchased of the plaintiffs herein certain supplies of the value of \$279.70, in payment for which said board did, on said 31st day of December, 1897, duly issue to the plaintiffs four certain warrants upon said city treasurer of Long Island City for said sum of \$279.70, which said warrants were on the same day duly approved in writing by Patrick J. Gleason, mayor of said city of Long Island City, and were then duly delivered to these plaintiffs; that said warrants were not paid, nor was any part thereof; that on January 1, 1898, the defendant the City of New York, by virtue of chapter 378 of the Laws of 1897, became the successor corporation in law and in fact of the said corporation the city of Long Island City, and of the general improvement commission of Long Island City, with all their lawful rights and powers, and subject to all their lawful obligations; that more than thirty days elapsed after the filing with the comptroller of said city of New York of a proper claim for the amount of said warrants before this action was brought," and "that the City of New York is liable for the payment of said warrants."

There is no question as to the facts as found by the court, in so far as they relate to the furnishing of the articles or the issuing of the warrants, but it is urged that as the fund out of which the improvements were to be paid was exhausted, the plaintiffs have no right of action against the city of New York, but that their remedy was by way of mandamus to compel the officials of Long Island City to procure the money necessary for the payment of the warrants.

It will not be disputed, as a general proposition, that where a public improvement is made under the auspices of a municipal corporation, where the fund for the payment of the same is to be derived from an assessment against the property benefited, no primary obligation against the municipality is created, and the remedy of the aggrieved party is by mandamus to compel the authorities of such municipality to proceed to levy and collect the fund as provided by law. It is equally well settled, however, that where the municipality has neglected to perform the duties imposed by law, the plaintiff may not be unreasonably deprived of his compensation, but may proceed against the municipality which is ultimately responsible for the debt.

"In making contracts with others in execution of the powers bestowed upon it," say the court in the case of *Beard v. City of Brooklyn* (31 Barb. 142, 151), "no liability will be created so long as it acts within the scope of its authority and with usual and reasonable diligence. But it cannot with impunity enter into contracts with individuals by which they are induced to expend their labor and substance in works of public improvement, and then refuse or negligently omit to employ the means given it by law for their recompense and reimbursement." The same doctrine is asserted in the case of *Baldwin v. City of Oswego* (2 Keyes [N. Y.], 132), the court relying upon the case of *Cumming v. The Mayor, etc., of Brooklyn* (11 Paige, 596). In that case it "was decided," say the court, "after an elaborate argument and by a well-considered opinion, that in a case of this kind where the officers of a corporation had unreasonably neglected to compel a proper assessment to be made, the plaintiff, who had performed the labor under a contract with the corporation, could compel payment by an action against it. The general fund, it was said, could be reimbursed out of the proceeds of the assessment when subsequently made. I am disposed to regard this judgment, which was pronounced in the highest court of general equity jurisdiction twenty years ago and which appears to have been acquiesced in, as an authentic precedent for the determination of the present case, and to hold that the defendant is responsible for the amount due the plaintiff on account of the neglect of its officers to enforce the legal instrumentalities provided for enforcing the payment against the parties primarily chargeable with such payment."

In the case of *Buck v. The City of Lockport* (6 Lans. 251) the court say: "In respect to such (municipal) corporations the rule extends no further than to exempt them from liability to actions for the recovery of such claims, primarily or in the first instance. The law presumes, in respect to all such claims, that they are contracted or created in reference to the power of the corporation, and the ways and means at its command of obtaining funds for payment, and will not allow such bodies to be harassed by actions unless they refuse or fail to exercise their power, or to use the means at their command to enable them to make payment and satisfaction in the prescribed form. But if they refuse or neglect to put the proper

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machinery in motion to raise the necessary funds, or to put the claims presented in proper shape for liquidation and payment, then the law gives the creditor his remedy by action to compel payment." So, in the case of *Dannat v. Mayor* (66 N. Y. 585), it was said: "But if the city had improperly omitted to provide the funds in the cases in which it is required by the statute to do so, and the chamberlain refused to pay the draft on that account, then the city could probably be sued, for then it would be in default." This is also asserted in the case of *Swift v. Mayor, etc., of City of New York* (83 N. Y. 528), and is clearly the law of this State.

In the case at bar, the common council of Long Island City, acting with the mayor, was authorized to issue bonds on the requisition of the improvement commission for the payment of the expenses of the public works authorized to be constructed, in an amount not exceeding \$1,500,000, and, of the bonds so authorized, \$1,255,000 were issued. The act provided that these bonds should be sold at par, in series of not to exceed \$50,000 each, and that the money realized upon these bonds should be deposited with the city treasurer and credited to the fund for the erection of public works, and that "all claims, expenses and charges of every kind connected with the making of any of the aforesaid improvements, including damages for lands and buildings taken for streets, avenues and public places, shall be paid by the said city treasurer and receiver out of the moneys received by him as aforesaid, but no money shall be paid out except upon the requisition of the said general improvement commission, approved by the mayor." (Laws of 1893, chap. 644.) The act further provides for assessments against benefited property for some parts of the improvements, but the intent of the act is clearly that the municipality shall provide for the immediate payment of all the expenses by the issue of such bonds as shall become necessary, without waiting for the collection of the special assessments. The general improvement commissioners, acting upon this idea, issued to the plaintiffs warrants upon the city treasurer of Long Island City on the 31st day of December, 1897, and it became the duty of the common council, in conjunction with the mayor, to provide the money for the payment of these warrants. This duty, it appears, was neglected, and on the following day, by operation of chapter 378 of the Laws of 1897, the city of New York succeeded to all

of the rights and powers, and assumed all of the obligations of the city of Long Island City and of the general improvement commission of Long Island City. (Charter, chap. 1, § 1.) All of the officers of the city of Long Island City were legislated out of office; the plaintiffs could not, therefore, proceed by mandamus to compel the officers of the former corporation to perform the duties pointed out by law. The municipality of Long Island City was, therefore, in default, and the city of New York, as the successor of Long Island City, became liable for the payment of the warrants issued to these plaintiffs, and, upon the refusal of the comptroller of the city of New York to pay these warrants, the plaintiffs had a cause of action for the recovery of the debt. To hold otherwise is to deprive the plaintiffs of all remedy, and to relieve the city of New York of one of the obligations which it assumed in becoming the successor of the city of Long Island City and the other corporations which were absorbed in creating the Greater New York. Indeed, while it does not seem to be necessary to discuss the question, it may be doubtful if the Legislature had the power to pass an act which should operate to deny to the plaintiffs in this action the right to recover for the goods which they have supplied to a constituent element of the city of New York. Long Island City, through its commission for the construction of public works, was authorized to contract the indebtedness now under consideration. There is no doubt that the plaintiffs, under the circumstances of this case, would have had a remedy, either by mandamus to compel the officers of the municipality to act or by an action upon the case, if the city of Long Island City had continued in existence. The Legislature having taken away the possibility of a remedy by way of a mandamus by repealing the laws under which the officers were empowered to act, there ought not to be any question as to the right of these plaintiffs to an action against the successor of the municipality thus legislated out of existence. If there is, then there is a violation of the obligation of the contract on the part of the city of Long Island City, and the Legislature is inhibited the power to pass any "law impairing the obligation of contracts." (U. S. Const. art. 1, § 10.) The obligation of the contract between the plaintiffs and the defendant is the obligation to pay the amount due for the supplies which the plaintiffs have furnished (*Sturges v. Crownin-*

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*shield*, 4 Wheat. 122; 1 Kent's Com. 420), and it is no part of the duty of the courts to so construe the law as to bring it into conflict with the Constitution either of the State or of the United States.

The judgment appealed from should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

JAMES B. HALL, Respondent, v. ERNEST OCHS, Appellant.

*Landlord and tenant — a surety on a lease not discharged by the lessee's death, nor by a failure to present the claim against his estate, nor by a change of occupation, nor by a violation of a covenant against subletting — authority of the president of a corporation to bind it — liability of a corporation upon a guaranty which, because of the identity of the names, is, on its face, the individual obligation of its president.*

A surety for the due performance of the covenants of a lease on the part of the lessee is not discharged from the obligation thereby assumed by the death of the lessee, nor by a neglect to present a claim covered by the obligation of such surety against the estate of the deceased lessee, nor by the lessor's assent to a change in the occupation of the premises, especially where it is mutual and has resulted in a reduction of the surety's liability, nor by a violation of a covenant in the lease against subletting, where the surety, a corporation, has consented to such subletting, and was clearly benefited thereby.

The authority of the president of a corporation to bind the corporation by acts within the scope of his apparent authority may be implied from the adoption or recognition of his acts by the corporation or its directors or trustees.

*Semble*, that a corporation is liable upon a guaranty which appears upon its face to be the individual obligation of its president, and has a wafer instead of the corporate seal attached, where it is admitted that the president of the corporation, whose name was identical with that of the corporation, intended to bind the corporation, and it appears that he was authorized to do so.

APPEAL by the defendant, Ernest Ochs, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 23d day of April, 1898, upon the verdict of a jury, with notice of an intention to bring up for review upon such appeal an order entered in said clerk's office on the 22d day of April, 1898, denying the defendant's motion for a new trial made upon the minutes.



*Charles L. Pashley*, for the appellant.

*Josiah T. Marean*, for the respondent.

WOODWARD, J. :

The plaintiff herein is the owner of certain premises used for a saloon on Atlantic avenue, in the borough of Brooklyn, and the defendant is a domestic corporation engaged in the manufacture and sale of malt liquors, its corporate name being identical with that of its president.

In March, 1895, the plaintiff executed a lease in writing, whereby he demised unto one Patrick Casey the premises above mentioned for a term of five years, beginning May 1, 1895, at an annual rental of \$2,160 for the first two years and \$2,400 for the last three years of said term, payable in equal monthly payments. The lease contained a covenant against assignment and underletting without the consent of the lessor, and attached to it was the written guaranty reading, in part, as follows :

"In consideration of the letting of the premises \* \* \* I, Ernest Ochs, of the city of Brooklyn, do hereby covenant and agree, to and with the party of the first part above named and his legal representatives, that if default shall at any time be made by the said Patrick Casey in the payment of the rent and performance of the covenants above contained on his part to be paid and performed, that I will well and truly pay the said rent, or any arrears thereof, that may remain due unto the said party of the first part, and also all damages that may arise in consequence of the non-performance of said covenants, or either of them, without requiring notice of any such default from the said party of the first part.

"Witness my hand and seal this eighth day of April, in the year of our Lord one thousand eight hundred and ninety-five.

"Witness,

ERNEST OCHS. [SEAL.]

"JOHN STEIL."

The seal was a wafer and not the corporate seal of the defendant.

The lease was twice assigned, notwithstanding the covenant against assignment, *first*, two days after its execution, by "Patrick Casey to Ernest Ochs, individually ;" and, *second*, on November 13, 1896, by Ernest Ochs, individually, to H. B. Scharmann & Sons.

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Patrick Casey occupied the premises and paid the rent until his death, in January, 1897. Then his son took possession, and Scharmann & Sons, the assignee, paid for him the rent, stipulated in the lease, up to June 1, 1897, when one Philip J. Reilly took possession, under an arrangement with Scharmann & Sons, and paid the rent for June and July to the plaintiff. After July the premises became vacant, default was made in payment of the rent for August and September, and the present action was brought upon the above guaranty to recover the rent due for the said months.

At the trial it was admitted by the defendant that its president, in signing the guaranty, intended to bind the corporation, and that this was the understanding of the parties, notwithstanding the individual character of the instrument, is clear. The jury found that the president of the defendant was authorized to sign the guaranty, and that there had been no release or surrender of the lease. They rendered a verdict for the plaintiff for the full amount of two months' rent, and from the judgment entered thereon, and from an order denying a motion for a new trial, the defendant appeals.

The appellant's first point is clearly untenable, and the cases cited by counsel furnish no support to his novel proposition that the surety was released by the death of the principal. This court, in *Holthausen v. Kells* (18 App. Div. 80), Mr. Justice WILLARD BARTLETT delivering the opinion, held that in the case of a guaranty of a lease the consideration was given once for all, and that the guaranty did not cease upon the death of the guarantor. This case was affirmed, on the opinion below, by the Court of Appeals (154 N. Y. 776), and the reasoning of it applies to the case at bar.

Nor does a neglect to present the claim against the estate of the deceased principal release the surety. (*Sibley v. McAllaster*, 8 N. H. 389; *Villars v. Palmer*, 67 Ill. 204.)

The second point advanced by the appellant is that plaintiff's assent to the changes in occupation discharged the guarantor. As such assent must be considered to have been mutual, and as it resulted in a reduction of the guarantor's alleged liability by just so many months' rent as the new parties paid, it seems that the point is not well taken.

The jury were justified in finding that there was no release.

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There was no surrender in writing and none by operation of law. Even though third persons entered and paid rent to the landlord after the original lessee quit the premises, the original lease remained in force. (*Schieffelin v. Carpenter*, 15 Wend. 400.)

With regard to the violation of the covenant against subletting, it is sufficient to say that the defendant, through its president, consented to such subletting, and was clearly benefited thereby. No ratification of the guaranty was needed if the latter was valid *ab initio* and defendant consented to the changes.

The appellant's counsel further contends that the execution of the guaranty was not authorized and that the agency was not properly proved. But the jury have found that the defendant's president acted within the scope of his apparent authority, and it is settled doctrine in America that the appointment of an agent may be inferred and implied from the adoption or recognition of his acts by the trustees and directors, or by the corporation. (*Bank of the U. S. v. Dandridge*, 12 Wheat. 64; *Danforth v. Schoharie & Duaneburgh Turnpike Road*, 12 Johns. 227.) In the former case, Mr. Justice STORY (at p. 70) said: "If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed."

In fact, the largest class of cases of agency is that which relates to trade affairs, where the agency is proved by inference, from the habit and course of dealing between the parties. Juries have frequently been advised to infer the grant of authority from the course of conduct and dealing adopted by the principal. (2 Greenl. Ev. [15th ed.] § 65.)

That a similar contract was not *ultra vires* was decided by this court in *Holm v. Claus Lipsius Brewing Co.* (21 App. Div. 204). To the same effect is *Koehler & Co. v. Reinheimer* (26 id. 1).

The judgment should be affirmed.

All concurred.

Judgment and order affirmed, with costs.

JOHN DEVLIN, Appellant, v. MARY E. HINMAN, Respondent.

*Trust — the effect of depositing money with a trust company in the name of the depositor as trustee for another — when it does not create an irrevocable trust.*

Where a father deposited his own money with a trust company in his name, as trustee for his daughter and his son, requiring them at the time to give to him powers of attorney authorizing him to control the fund, and the father treated the account at all times as his own, retaining the pass book in his own possession, and alone drawing checks upon the account, some of which were drawn to the order of the daughter without objection on her part, the father using the account without reference to, or consultation with, either of his children, the court considered that it was understood by all the parties that the father was the owner of the money, and that he never intended to, and never did, divest himself of the title thereto, and never made any irrevocable trust in respect thereof.

APPEAL by the plaintiff, John Devlin, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 23d day of February, 1898, upon the decision of the court rendered after a trial at the Kings County Special Term dismissing the plaintiff's complaint.

*Horace Graves*, for the appellant.

*Edward M. Grout*, for the respondent.

GOODRICH, P. J. :

The action was originally instituted against the Hamilton Trust Company and Mary E. Hinman. The complaint alleged that in March, 1895, the plaintiff entered into an agreement with his children, George W. Devlin and the defendant, Mary E. Hinman, by which it was agreed that if the plaintiff deposited with the Hamilton Trust Company the sum of \$60,000 or other moneys, to the joint credit of said George and Mary, they would each execute a power of attorney to the plaintiff by which he would be able to draw such moneys from the trust company and use the same as he deemed best; that, on April fifteenth, the powers of attorney were executed by George and Mary; that the plaintiff, from March twenty-sixth to May sixth, deposited with the trust company \$66,701.25 and

handed the powers of attorney to the trust company; that on the third or eleventh of June the defendant, Mrs. Hinman, notified the trust company that she had revoked the power of attorney, but that no notice of such revocation was given to the plaintiff, and that in ignorance of such fact he deposited other sums of money with the trust company; that on November nineteenth the plaintiff withdrew the sum of \$96,978.93 and redeposited the same with the company in his own name; and that the trust company refused to permit the plaintiff to withdraw the sum of \$48,261.73, being one-half of the deposit, for which sum the plaintiff demanded judgment.

The Hamilton Trust Company answered, admitting the deposit of \$66,701.25, and subsequently the court directed the trust company to pay into court to the credit of this action the sum of \$48,261.73, with interest, and the trust company was dismissed from the action.

The answer of the defendant, Mrs. Hinman, alleged that the money in question was on deposit with the trust company, in the name of the plaintiff, in trust for her and her brother George, and was her property, and that it was deposited under a power of attorney executed by her to the plaintiff, which she afterward revoked.

The plaintiff's contention is, that the account was opened by him for his own benefit; that he was the sole owner of the account and the moneys deposited, and that he never gave the money to the defendant, while the defendant claims that the transactions constituted an absolute gift to her from her father. The plaintiff and defendant were examined as witnesses at the Special Term, and it is chiefly upon their testimony that the question must be decided.

The court found that on April 6, 1893, the plaintiff deposited \$100,000 with the People's Trust Company, in the name of John Devlin, in trust for Mary Hinman and George W. Devlin; that thereafter the plaintiff showed the pass book to the defendant "and then and there stated to her that the account had been opened for her and for her brother;" that on March 6, 1895, the plaintiff opened an account with the Hamilton Trust Company, in the name of Mary and George, in which, prior to May 6, 1895, was deposited nearly \$6,000; that on that day there was deposited in this account \$60,000, which was withdrawn from the account in the name of George, previously deposited in the People's Trust Company, in a former account therein, in the name of John Devlin, in trust for

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Mary and George; and that thereafter, and down to November 19, 1895, the plaintiff made other deposits with the Hamilton Trust Company, which, with interest, brought the account up to \$96,978.93, of which the plaintiff gave one-half to the defendant, Mrs. Hinman, "by way of advancement."

As conclusion of law, the court found that the sum named belonged to the defendant, Mrs. Hinman, and directed the payment of the money to her. From the judgment entered upon this decision the plaintiff appeals.

Enough has been said to indicate that this appeal must turn upon the question whether the transactions mentioned constituted a gift from the plaintiff to his daughter.

This court has stated the view which it entertains of the law applicable to deposits similar to that in the present action, in *Decker v. Union Dime Savings Institution* (15 App. Div. 553), where a depositor opened an account in these words: "William F. Du Bois, trustee for Ellenora H. Decker." Mr. Justice HATCH, speaking for the court, said (p. 554): "The language used by the depositor in making the deposit in the present case is in all respects similar to the language used in *Martin v. Funk* (75 N. Y. 134). It constitutes an unequivocal declaration of trust in favor of the beneficiary. But while this is true, it by no means follows that the legal title to the fund passes to the beneficiary or that the depositor of the fund has divested himself of title. The declaration is simply evidence of an intent to create a trust in favor of the beneficiary named, and may or may not be conclusive of such fact. (*Beaver v. Beaver*, 117 N. Y. 430.) \* \* \* If the trust be once established it is irrevocable in the absence of any reservation of power of revocation. (*Mabie v. Bailey*, 95 N. Y. 206.)"

An appellate court is always reluctant to differ with the findings of the court at Special Term upon matters of fact. We recognize the fact that the Special Term has better facilities for deciding questions of fact, the decision of which must in some measure depend upon the appearance of witnesses and the manner in which their testimony was given. But when it appears that the decision of the trial court is against the weight of the evidence, or that the proof so clearly preponderates in favor of a contrary result that it can be said with reasonable certainty that the trial court erred in its

conclusions, the judgment should be reversed (*Foster v. Bookwalter*, 152 N. Y. 166); and in the present case we cannot resist the conclusion that the testimony of the defendant herself and the documentary evidence about which there can be no dispute evince in a strong manner that the plaintiff never intended to, and did not in fact, make an absolute gift to the defendant of the deposit in question. The plaintiff for many years had been a contractor, doing work for the city of Brooklyn, and had amassed a considerable sum of money. On April 6, 1893, he drew his check on the First National Bank of Brooklyn, to his own order, for \$100,000, and indorsed it "Pay to People's Trust Co., John Devlin." It was deposited in the People's Trust Company in an account headed "John Devlin, Trustee, for Mary E. Hinman and George W. Devlin." After the time of such deposit, commencing with August 11, 1893, down to January 31, 1894, the plaintiff drew nearly 100 checks upon the account, in large and small sums. On November 21, 1893, the account was balanced on the books of the People's Trust Company, the balance, \$46,052.23, being brought forward to an account with a similar heading on another ledger. On October 18, 1894, there appears a deposit of \$60,000 in this account. The plaintiff continued to draw checks, more than 30 in number, down to September 25, 1894, when the account was again balanced, such balance to the credit of the plaintiff being \$94,897.46. This balance being carried forward to an account with the same heading, other deposits were made, bringing up the total deposit to \$105,896.46, and on January 31, 1895, a balance was struck, showing the sum of \$850.94 to the credit of the plaintiff. This last account contains a check of John Devlin, trustee, dated January 31, 1895, to the order of George, for \$69,000, which was indorsed by George and deposited in the People's Trust Company in an account headed with the name of George W. Devlin, to which account various other deposits were added and against which sundry other checks were drawn by the plaintiff, so that on April 19, 1897, when the account was balanced, there was standing to the credit of the account \$7.31.

It will be observed that in the account of the People's Trust Company with George W. Devlin there appears a deposit of \$60,036.25 under date of May 7, 1895. Apparently, this was the proceeds of

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a check dated March 4, 1895, and drawn by said George on the People's Trust Company to the order of Mary and George, for the sum of \$60,000. This check was indorsed with the names of George and Mary "for deposit account," and was deposited with the Hamilton Trust Company on May sixth. There is a difference between the amount of the check and the deposit, but we assume that it is the same check, the difference probably being interest on the amount of the check. In the same account, under date of January thirty-first, is a deposit of \$69,000 which was the proceeds of a check of that date, signed by John Devlin, trustee, to the order of and indorsed by George, for the sum of \$69,000.

The record contains transcripts of the accounts with the Hamilton Trust Company. The first was headed "Hamilton Trust Company, in account with Mary E. Hinman and Geo. W. Devlin." The first deposit was of \$2,100, on March 26, 1895; several other deposits were made, and on May sixth there was deposited \$69,862.50, which was evidently the deposit of the \$69,000 check and perhaps the balance to the credit of Devlin, trustee for George and Mary, in the People's Trust Company, already referred to. This was followed by other deposits, down to July nineteenth, the total amount being \$96,778.93. On November nineteenth this entire amount was drawn out by a check signed "John Devlin, Atty., George W. Devlin and Mary E. Hinman," to the order of John Devlin, in trust, and indorsed "Cr. ac. John Devlin in trust," and was used in the opening of another account with the Hamilton Trust Company, headed "John Devlin, in trust for Mary E. Hinman and George W. Devlin." More than fifty checks were drawn against this account, commencing with December 26, 1895, and ending on September 28, 1896, when the account showed a balance to the credit of the account amounting to \$48,261.73, which is the sum in litigation.

It appeared in evidence that George, on April 13, 1895, and Mrs. Hinman, on April fifteenth, executed written powers of attorney which, among other things, gave the plaintiff full power to control the trust company account in question and to deposit and draw moneys in any bank; and that on June 3, 1895, Mrs. Hinman executed a revocation of her power of attorney, which was communicated to the Hamilton Trust Company on June eleventh.



Among the checks upon the Hamilton Trust Company were twenty-one which were given to the order of the defendant for her personal expenses.

I have already said that while there are other witnesses than the plaintiff and defendant, the decision of this appeal must rest largely upon the credit to be given to the testimony of the plaintiff or defendant, taken in connection with the documentary evidence. It is true that the son and two other witnesses testified in corroboration of the plaintiff, but, as the learned judge at Special Term does not seem to have credited them, I do not think it necessary to rely upon their testimony, and I rest the decision of the question of fact upon an examination of the testimony of the plaintiff and the defendant and proceed to state their evidence upon the main question.

The plaintiff testified that in November, 1894, the defendant asked him to deposit money in the bank in the name of herself and her brother; and that "I told her I would put money in the bank in her name and in my son's name, but before doing that they must each give me a power of attorney, and in 1895 I said that no one should control the fund but myself. I told them that I should own it. That was in 1895. This conversation that I had been testifying about took place part of it in 1894, and the next was in 1895. I think it was in the early part of 1895 around March or April. She said that she would give me a power of attorney and that she would be glad if I would deposit the money in her name; it was understood that I should own it; should have a right to take it out and do what I liked with it; I told her my object in putting it up was for the purpose of giving certified checks when I should take a contract. Contracts for—municipal contracts, and other work. My business was that of a contractor for thirty-five years. I made all the deposits. This is the book of deposits." He further testified that he opened an account with the Hamilton Trust Company and received a pass book which always remained either in the possession of himself or the trust company, and that all of the moneys deposited in the account came from and originally belonged to him.

Mrs. Hinman testified as follows: "The first time there was any conversation between my father and myself concerning money in the bank was in February, 1892. This was said: He gave me a paper to keep which had been drawn up—an assignment, I think

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the paper reads. The instrument reads that there was money put in my name. He did not tell me as a matter of fact that there was an account opened. The first conversation between me and my father as to that account was in 1893; papa came and showed me a pass book of the People's Trust Company. That pass book showed; I didn't take it from papa's hands; he opened it; I saw at the top of the account, George W. Devlin and Mary E. Hinman, \$100,000. This pass book you showed me I could not say that is the book which my father showed me. The reading at the top is the same. Q. Is it like or similar? A. Yes, sir. The conversation had between me and my father at that time, he said half of this is a gift. That half of this is a gift and is for me to use, *and that whenever he needed money he should always have it.* This was in 1893, and the next was in 1894. Before going to the country papa asked me if I would indorse a blank check, and he said while I was in the country there was three or four connections between Connecticut and New York — trains irregular; he asked me if I would indorse a check so that he could buy stock in case anything — any good opportunity should present itself on the exchange, and I endorsed the checks, several checks. I never saw any of those checks again on which I wrote my name in blank. \* \* \* There was nothing said in that conversation about any condition or agreement, or power of attorney or anything except to refer to what was to be given me and to George. It was always an absolute gift, I understood. My father at no time when the conveyances were made never said anything to me about my going security for him on any contract. He never asked me to sign any bond as security or issue certified checks, checks to be certified and used in business. \* \* \* It isn't true that there was any stipulation or restriction upon the ownership of the gift of either the land or the money expressed in my conversation between my father and myself; never to me — there never was a stipulation as far as papa and I was concerned. The reason why my father gave me, at any of these conversations, why he was putting money in my name was for love and affection — a gift to me. That is not my impression of it; he told me. He used those words, 'love and affection,' continuously."

It also appeared that Mrs. Hinman, at the request of her father,

signed or indorsed a number of checks in blank, the object of which, she testified, was a "mystery" to her.

From a careful reading of the testimony already quoted and from the documentary and other evidence in the case, I cannot escape the conclusion that the plaintiff never intended to give the money in question to his children. This conclusion was so clearly required by the evidence that a finding to the contrary was error. The accounts stood in the name of the plaintiff as trustee for his children. They gave him powers of attorney to control the account, and this he did absolutely. Even Mrs. Hinman admitted in her evidence that when, as she claims, the gift was made to her, her father said "Whenever he needed money he should always have it," showing that the gift was not absolute, even on her own statement. Mrs. Hinman assigned or indorsed checks in blank as he requested, and the plaintiff used the account without reference to or consultation with either of his children. All checks were drawn by him, even for the personal expenses of the defendant. No objection was made to this course of procedure until, owing to differences between the plaintiff and his daughter, Mrs. Hinman revoked her power of attorney; and, while she gave notice of this revocation to the trust company, she concealed this fact from her father, so that, in ignorance of the revocation, he continued to deposit money and draw checks as he had always done. Mrs. Hinman does not deny her signature to the power of attorney, although she denies that she acknowledged it before a notary. I can see no reason for the execution of such a power of attorney by her, if the money was an absolute gift to her, and her story is inconsistent with her contention.

The first account in the People's Trust Company stood in the name of the plaintiff as trustee for his children. Still the plaintiff, at all times for a year and a half, controlled and used this account and drew checks upon it without reference to or consultation with his children. This account was practically closed on January 31, 1895, by the check of \$69,000 to George's order, which, for some unexplained reason, was used to open a new account in the same company, in the name of the son alone. This account, it will be especially noted, was not in the name of Mrs. Hinman, but in the name of George. It seems to have been used by the plaintiff for general business purposes under George's power of attorney, in just

the same way as he had used the previous account, and this continued from February 13, 1895, down to April, 1897. But on March 4, 1895, the check for \$60,000 was drawn by George to the order of Mrs. Hinman and himself, and this is apparently indorsed by both. It was not deposited, however, until May sixth.

Mrs. Hinman testified that she never indorsed any check drawn by George, but as she admitted that she had at her father's request indorsed several blank checks in 1894, it may well be that the check was one of them. On the other hand, the plaintiff testified that Mrs. Hinman did indorse this particular check. I have personally examined the exhibits and compared what purports to be her signature on the \$60,000 check with her admitted signatures on several of the other exhibits, and I am convinced that she is in error as to her indorsement of the \$60,000 check, although, as already stated, it may be one of the checks which she indorsed in blank. Indeed she testified cautiously when she said: "I don't remember ever endorsing a check like that after it had been filled out. I never endorsed a check drawn by George Devlin. \* \* \* I never endorsed that when it was filled out." It seems clear that the indorsement was made by her and it tends strongly to verify the belief that she knew that there was no irrevocable gift of the accounts to her.

To summarize the facts, it is evident that the money originally belonged to the plaintiff, and that he treated the accounts, both in the People's Trust Company and the Hamilton Trust Company, at all times as his own; that he changed them from time to time as he saw fit; that he retained the pass book in his own possession; that he alone controlled the accounts and drew checks against them, and that Mrs. Hinman received moneys upon the plaintiff's checks drawn to her own order, and in no instance objected to his control of the accounts until difficulties arose between them, when she revoked her power of attorney, and then only instructed the Hamilton Trust Company that such checks must not be charged to what she claimed to be her half of the account. There is ample evidence for the conclusion that both parties understood that the plaintiff was the owner of the money, and that he never intended to and never did divest himself of the title to the fund, and never made any irrevocable trust thereof. The sole question here, as in *Decker v. Union Dime Savings Institution (supra)*, is whether the legal title to the fund

passed from the plaintiff to Mrs. Hinman, and whether the plaintiff divested himself of such title. I am forced to believe that the plaintiff did not intend to divest himself of the title, and that Mrs. Hinman did not understand such to be his intention

There are no creditors whose rights are to be protected, and there is no suspicion in the record that there was any intention on the part of the plaintiff to cover up the account so as to defraud creditors, in which case a different rule would apply.

We are not embarrassed by our opinion in *Hinman v. Devlin* (31 App. Div. 590) upon which the respondent relies. This court had under consideration on that appeal certain transactions between the plaintiff herein and his children, in regard to conveyances of his real estate by the plaintiff to them, and it was assumed that the plaintiff had made these conveyances to his children as advancements. Incidentally, some of the matters involved in the present action came under consideration, but we made no ruling inconsistent with this opinion. Mrs. Hinman brought that action to set aside a conveyance by her father to her brother, under her power of attorney, of real estate which he had deeded to her. We held that this conveyance, executed under Mrs. Hinman's power of attorney to the plaintiff, was made after a quarrel among the three members of the family, to the son George, who had full knowledge of Mrs. Hinman's claims to the absolute ownership of the property, and that the execution of the deed, under the circumstances stated in that case, was an abuse of the trust confided in the father, and for this reason we set the conveyance aside. But the decision in that case is not conclusive of the facts in the present action.

I am clear in my conviction that the judgment should be reversed and a new trial granted.

All concurred.

Judgment reversed and new trial granted, costs to abide the final award of costs.

CHARLES HAGEDORN, Appellant, v. MAX LANG, Respondent.

*Auction sale of real estate—signature of the terms of sale by the vendor before the sale, is a sufficient compliance with the Statute of Frauds—such memorandum is not the final instrument.*

Where an auctioneer and a vendor of real property, just before the sale thereof at auction, sign the terms of sale with a poster attached thereto containing separate diagrams of the parcels to be sold, and the auctioneer reads them to the assembled buyers, and at the time of knocking down one of the parcels makes on such parcel, as laid out on the diagram then before him on the stand, a pencil memorandum of the amount bid and of the name of the purchaser, there is a sufficient compliance with the Statute of Frauds, and the fact that the terms of the sale were signed by the vendor before the sale does not impair its validity.

The memorandum to be subscribed by the party by whom a sale is to be made is not the final instrument, but only a paper containing the terms of the transferring instrument thereafter to be made.

APPEAL by the plaintiff, Charles Hagedorn, from a judgment of the County Court of Kings county in favor of the defendant, entered in the office of the clerk of the county of Kings on the 30th day of March, 1898, upon the dismissal of his complaint by direction of the court after a trial before the court and a jury.

*P. E. Callahan*, for the appellant.

*Josiah T. Marean*, for the respondent

GOODRICH, P. J.:

The only question involved in this appeal is whether there was a contract for the sale of real estate, or a note or memorandum thereof in writing.

Mr. Brumley, as auctioneer, had advertised for sale at auction, on April 20, 1898, at the Real Estate Exchange in the borough of Brooklyn, four parcels of real property, among them the premises in question, No. 625 Prospect place, Brooklyn. A poster had been circulated which contained separate diagrams of the four parcels. The auctioneer testified that just before the sale he and the plaintiff, who was the vendor of the property, signed the terms of sale with the poster attached thereto; that these terms were laid upon

the stand in front of him and were read to the assembled buyers; that at the time of knocking down the property he wrote on the parcel in question, as laid out on the diagram attached to the terms of sale, then and there before him on the stand, the pencil memoranda "2425" and "Mr. Lang;" "that \$2,425 was the bid made by Mr. Lang." There appears a similar pencil entry upon the diagram of another one of the four parcels, "\$6,575 E. T. Martin." No entries were made as to the other two parcels.

The original terms of sale were made an exhibit, and were presented on the argument of the appeal. The first page contains the terms of sale and is subscribed, "Chas. Hagedorn, Vendor. Jas. A. Brunley, Auctioneer." There is in this exhibit a second and separate page of the terms of sale not appearing in the record, on which are four printed blanks called "Memoranda of Purchase," evidently intended to be signed by the purchasers at the sale. No one of them is signed by the plaintiff, the defendant or the auctioneer.

The sole question which arises on this appeal is whether the poster containing the pencil entry, taken in connection with the terms of sale prepared and signed by the vendor and auctioneer just before the sale, is a sufficient compliance with the statute, which reads as follows:

"§ 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." (2 R. S. [9th ed.] 1885.)

"§ 9. Every instrument required to be subscribed by any party, under the last preceding section, may be subscribed by the agent of such party lawfully authorised."

The purpose of the Statute of Frauds is sufficiently indicated by its title. It is a statute against frauds. It was designed to prevent litigation over oral agreements, where the terms are always dependent upon the uncertain and varying memory of witnesses. This evil was to be remedied by the reduction of the terms of the contract to writing, so that the parties might not misunderstand the particulars of the contract which they were making; that no one might

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be induced to enter a court of justice to vex the peace of his opponent without clear and definite evidence of the terms of the contract which formed the ground of action, equally accessible to both parties and to the court; and that perjury might not be invited to sustain a claim which never had any real existence.

In *Penniman v. Hartshorn* (13 Mass. 87, 90), a similar action, the court, PARKER, Ch. J., writing, stated the object of the statute to be "that the bargain shall be proved by writing, and not by parol, in order that purchasers shall not be caught up on loose conversation, or that the proof of the contract should not rest upon the recollection or integrity of witnesses."

In *Smith v. Surman* (9 B. & C. 561, 571) LITTLEDALE, J., said: "The intention of the Legislature in making the statute in question, appears by the preamble to have been to prevent fraudulent practices, commonly endeavored to be upheld by perjury and subornation of perjury; and for that purpose, in order to prevent them, it requires that the terms of contracts shall be reduced into writing, or that some other requisite should be complied with to show manifestly that the contract was completed." In the same case BAYLEY, J., said (p. 569): "The object of the statute was that the note in writing should exclude all doubt as to the terms of the contract."

Mr. Greenleaf in his work on Evidence (Vol. 1 [15th ed.], 358) says: "The rules of evidence contained in this celebrated statute are calculated for the exclusion of perjury, by requiring, in the cases therein mentioned, some more satisfactory and convincing testimony than mere oral evidence affords."

With this object of the statute thus plainly and authoritatively announced, it is evident that this case is one where all the terms of the contract appear in the memorandum of the vendor and auctioneer, so that the mischiefs which the Statute of Frauds was designed to prevent can have no existence.

The learned counsel for the respondent contends that the case is not taken out of the statute because the signature was made before the sale, and that the intention of such signature was simply to express the terms upon which the sale was to be made and not an intention to express the assent of the vendor to the sale when it should be made; that there should have been another signature after the sale, to show that the vendor assented to the defendant's



bid and then and there agreed to sell him the property according to the prescribed terms. We think, however, that the entry of the purchaser's name and the amount of his bid by the auctioneer upon the diagram annexed to the terms of sale, which had been signed by the vendor just before the sale and which were present at the sale, made this memorandum and the terms of sale taken together a complete note or memorandum signed by the vendor, which is sufficient to meet the requirements of the statute.

It will be observed that the statute says that the memorandum must be subscribed by the party by whom the lease or sale *is to be made*, thus indicating clearly that the memorandum is not the final instrument but only a paper containing the terms of the transferring instrument thereafter to be made.

In *Coddington v. Goddard* (82 Mass. [16 Gray] 436, 444) BIGELOW, Ch. J., writing the opinion, said: "Nor is it at all material that the names should be written at the bottom of the memorandum. It is sufficient if the names of the principals are inserted in such form and manner as to indicate that it is their contract, by which one agrees to sell and the other to buy the goods or merchandise specified, upon the terms therein expressed. It is the substance, and not the form, of the memorandum, which the law regards. The great purpose of the statute is answered, if the names of the parties and the terms of the contract of sale are authenticated by written evidence, and do not rest in parol proof."

In *Parkhurst v. Van Cortlandt* (1 Johns. Ch. 273, 281) Chancellor KENT said: "I am warranted in considering it as a settled principle, that, if the court cannot ascertain, with reasonable certainty, the terms of the agreement, from the writing or for (*sic*) some other paper to which it refers, the writing does not take the case out of the statute."

In *Mentz v. Newwitter* (122 N. Y. 491), a case of real estate at auction, the court held the essentials to be, the subject-matter of the sale, the terms and the names or a description of the parties, but decided that there was no valid contract, as the memorandum, though signed by the auctioneer, did not contain the name of the vendor. This action was brought against the purchaser. The court said (p. 498): "The memorandum in suit failed to state the name of the vendor or to give any description by which he or she could

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be identified, and this omission was fatal. In the potent language of the statute the contract was void."

The case of *Price v. Durin* (56 Barb. 647) has never been questioned, so far as I can ascertain. It was a case where there was a sale of personal property at auction continuing two days. Before the sale commenced, a memorandum was made in the auctioneer's book, as follows:

"April 5th, 1866. Memorandum of auction sale, on account of Milton S. Price, of boots and shoes, commencing April 5th, 1866. Terms, 90 days, bank note, approved paper, names of purchasers and lots struck off to each, as noted as hereafter following.

"JESSE BUTLER, *Auctioneer*.

"PER W. STITT, *Clerk*."

The sale continued through the day, and Stitt, the auctioneer's clerk, at the time of each sale, in the presence of and under the direction of the auctioneer, entered in the book under the above memorandum the name of each purchaser, the number and kind of articles sold and the price. At the end of each day the memorandum was signed by the auctioneer's clerk. The contention was made that a memorandum should have been made as often as a parcel of goods was sold, and that the entry which was made at the sale of each parcel, together with the head memorandum, was not sufficient. At this time the Revised Statutes (3 R. S. [5th ed.] 222, § 4) provided that whenever goods were sold at auction, in order to relieve the sale from the operation of the Statute of Frauds, "the auctioneer shall at the time of sale enter in a sale book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser and the name of the person on whose account the sale is made; such memorandum shall be deemed a note of the contract of sale within the meaning" of the statute relative to contracts for the sale of personal property, which is the same as that now in force and which requires the memorandum to be *subscribed* by the parties to be charged therewith. The court said (pp. 650, 651): "Several authorities are cited by the counsel in support of his proposition, but it is enough to say of them that they were each cases of an auction sale of a single

article. \* \* \* I have no doubt that the general memorandum, entered on the 5th of April, applied to each of the sales on both days, and that the other entries made by Stitt at the close of the sale of each parcel, under the direction and in the presence of the auctioneer, was a sufficient compliance with the statute to make the sale valid." ●

It will be observed that the statute under consideration in that case, like the statute under consideration in this case, required the entry to be made at "the time of sale" and to be *subscribed* by the parties. I think the reasoning of this case is applicable to the case at bar. The statute made it necessary for the auctioneer, "at the time of sale," to make his entry. A part of such entry was made before the sale commenced, and part of it, not when each sale was made, but at the end of the day's sale, and the court construed both entries as making together a complete memorandum. It is familiar doctrine that instruments made at the same time are to be construed together. Mr. Greenleaf says: "It is sufficient, if the contract can be *plainly made out, in all its terms, from any writings* of the party, or even from his *correspondence*. \* \* \* For the policy of the law is to prevent fraud and perjury, by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever. Nor is the *place of signature* material. It is sufficient if the vendor's name be printed in a bill of parcels \* \* \*." (1 Greenl. Ev. [15th ed.] 363, 364.)

We think that the entries on the diagram form a component part of the terms of sale, and that, the vendor having signed the terms of sale, being present at the sale and knowing of the sale to Mr. Lang, his signature to the terms of sale, with the subsequent writing of the purchaser's name and amount of bid on the diagram attached thereto, is a sufficient compliance with the statute.

The judgment should be reversed and a new trial granted

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

PETER NUGENT, Respondent, v. ADAM W. BEAKES, Sheriff of Orange County, Appellant.

*Statute of Frauds—delivery and acceptance of goods sold subject to their being satisfactory to the vendee—effect of their delivery by the consignor to a carrier not selected by the consignee.*

Although merchandise of the value of more than fifty dollars is purchased upon the verbal understanding between the purchaser and a third party that it is to be sold to the third party, if it proves satisfactory to him, and is delivered by the purchaser in accordance with such understanding to a general carrier not designated nor selected by the third party, and is by the purchaser consigned to the third party by a bill of lading forwarded to him by the purchaser (the consignor), there is no sufficient delivery and acceptance of the goods, and the title thereto remains in the consignor until the merchandise has been inspected by the third party, who has, until such inspection, no leviable or attachable interest in the merchandise as against such consignor.

APPEAL by the defendant, Adam W. Beakes, sheriff of Orange county, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Orange on the 14th day of January, 1898, upon the verdict of a jury, and also from an order bearing date the 11th day of January, 1898, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

*M. N. Kane*, for the appellant.

*Henry Bacon* [*J. W. Gott* with him on the brief], for the respondent.

GOODRICH, P. J.:

A warrant of attachment was issued to the defendant, as sheriff of the county of Orange, in an action brought by Ralph Wisner against Conrad Schopp & Co., of St. Louis, Missouri, under which the sheriff levied upon 454 sacks of onions, alleged to be the property of Schopp & Co. The present action was instituted by the plaintiff Nugent for claim and delivery of the onions, on the ground that he, and not Schopp & Co., was the owner of them. The coroner took the goods from the sheriff and delivered them to the plaintiff. The answer justified the seizure under the warrant of attach-

ment, and alleged that Schopp & Co. owned the onions, or had a leviable or attachable interest therein.

The issue was tried before the court and a jury, which rendered a verdict for the plaintiff for \$250 damages for detention, and from the judgment entered thereon and an order denying a motion for a new trial the defendant appeals.

It is evident from the record that the question of the title to the onions at the time of the levy by the sheriff was the real issue involved, and that this, on the evidence, was a simple question of fact. The court said: "The whole case hinges on the single question, who had the legal title to these onions on the 13th day of March, 1897, when I understand the levy was made?" There was no exception to the charge, but the defendant had moved, at the close of the case, to dismiss "upon the specific ground that Conrad Schopp & Co., under all the testimony in this case, had an attachable interest in these onions; that whatever interest he had was attachable interest by the sheriff," to which the court, denying the motion, replied, "It is attachable if the jury believe your theory."

The plaintiff testified that he bought the onions of Wisner, paid him the price in cash, and directed them to be placed on cars and consigned to Schopp & Co. by bill of lading, which was made out and delivered to the plaintiff and by him forwarded to Schopp & Co., with whom he had an agreement for the purchase of onions. This agreement is stated by the plaintiff to be based upon negotiations occurring in St. Louis between himself and Schopp, which closed with the statement of Schopp to the plaintiff: "If you will go to Orange county and buy onions we will buy all the onions you buy if the quality is satisfactory, and give you ten cents advance over the original purchase price." He also testified that Schopp & Co. had the right to accept the goods if they were satisfactory, or refuse to accept them if unsatisfactory, on their arrival at St. Louis. This testimony was corroborated by Schopp.

On the other hand, the defendant produced evidence to show that the sale was made by Wisner directly to Schopp & Co., and that Nugent was acting as the agent of the latter in the transaction, and that the vendor gave Nugent a receipt prepared by the latter, which read: "Received of Conrad Schopp so much money, \$1,180.40 dollars, 454 sacks of onions." It is not necessary to state in detail

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the other evidence. It is sufficient to say that there was raised a clear question of fact as to the person to whom the onions were sold; there was sufficient evidence to justify a verdict that the onions were sold either to Nugent or to Schopp, and the verdict will not be disturbed.

The defendant, however, contends that the title to the onions vested in Schopp at the time of the purchase. But we are of opinion that this, as matter of law, is not true.

It is well settled that, upon a verbal contract for the sale of goods of more than fifty dollars in value, a delivery of them in accordance with such contract to a general carrier, not designated or selected by the buyer, does not constitute such a delivery and acceptance under the Statute of Frauds as to pass the title to the goods (*Rodgers v. Phillips*, 40 N. Y. 519; *Pierson v. Crooks*, 115 id. 539); that there must be some act or conduct on the part of the vendee, manifesting his intention to accept them absolutely and unconditionally, in full performance of the contract of sale. (*Stone v. Browning*, 51 N. Y. 211; *Allard v. Greasert*, 61 id. 1.)

The court instructed the jury as follows:

"They say that Mr. Nugent came here because of that understanding; that he bought those onions himself at \$2.60 a barrel or a sack, and that he consigned them to Mr. Schopp at St. Louis in pursuance of that understanding or agreement with the intention of selling them to him there, if upon inspection they should prove to Mr. Schopp to be within the terms of their verbal understanding, in other words, to be satisfactory, to be acceptable to him and to be accepted by him on inspection. And I say to you, for the purposes of this case, that if that is so, then the title of the property did not pass at the time the goods were placed upon the cars, and as between this officer and the vendee, Mr. Schopp, Schopp was entitled to the opportunity to inspect the goods and accept them on their delivery at St. Louis, and, therefore, they were not lawfully taken under this warrant of attachment."

It is clear from the evidence that Schopp & Co. did not designate the carrier, and that they had the right to inspect the goods before acceptance, so that the title did not pass to them at the time of the transaction between Nugent and Wisner, and, consequently, that Schopp had no leviable or attachable interest in the onions as against

the plaintiff; and as under the charge of the court the jury have found for the plaintiff, we see no reason to review the verdict.

We have carefully examined the other exceptions in the case and find no reversible error. The judgment must be affirmed.

All concurred, except HATCH, J., absent.

Judgment and order affirmed, with costs.

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MARY I. YOUNG, as Administratrix, etc., of ROBERT YOUNG;  
Deceased, Appellant, v. NASSAU ELECTRIC RAILROAD COMPANY,  
Respondent.

*Leave to sue as a poor person — petition establishing a prima facie case — effect of a decision adverse to the plaintiff in a previous action for the same cause.*

A petition, on an application for an order authorizing the petitioner to sue *in forma pauperis*, which alleges the facts upon which the action is to be based, and the poverty of the petitioner, establishes a *prima facie* case for the granting of the order.

On an application by the defendant, in such an action, for the vacation of such an order, the court may properly consider, as bearing upon the merits of the plaintiff's right to sue *in forma pauperis*, the fact that in a previous action for the same cause there have been two trials, the first ending in a disagreement of the jury, and the second in a dismissal of the complaint at the close of the plaintiff's case, upon which a judgment was subsequently entered for costs, which the plaintiff has not paid.

APPEAL by the plaintiff, Mary I. Young, as administratrix, etc., of Robert Young, deceased, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 12th day of September, 1898, vacating an order permitting the plaintiff to sue *in forma pauperis*.

John A. Straley, for the appellant.

Frederick S. Martyn, for the respondent.

GOODRICH, P. J. :

The plaintiff had previously brought an action against the defendant for the same cause as is alleged in the complaint herein. There had been two trials of such former action, the first ending in a dis-

agreement of the jury, and the second in a dismissal of the complaint at the close of the plaintiff's case, upon which a judgment for costs was subsequently entered. The plaintiff thereafter commenced the present action and obtained an order to sue as a poor person. The defendant moved to set aside such order, and such motion was granted, and from the order entered thereon the plaintiff appeals.

The Code of Civil Procedure (§§ 460, 461) authorizes an order permitting a plaintiff to sue as a poor person, where the court is satisfied of the truth of the facts alleged in the petition, and provides that when such an order is made the plaintiff shall not be prevented from the prosecution of the action by reason of his liability for the costs of a former action. Here is a plain requirement of the exercise of judicial discretion in granting an order to sue as a poor person, and if the court was possessed of sufficient facts to justify the use of its discretion, we may not interfere.

The petition upon which the order to sue as a poor person was granted *ex parte* simply alleged the facts upon which the action was to be based and the poverty of the plaintiff. This made out a *prima facie* case which was sufficient to authorize the granting of the order. But it was essential that the plaintiff should have a meritorious cause of action. If she had such cause of action, the statute is explicit that the fact that she had not paid the costs recovered against her on a previous suit shall not preclude her from maintaining the present action; still the adverse result of the previous action was properly to be considered on the merits of her right to sue as a poor person. The court was called upon to exercise discretion just the same as it was called to do upon the original motion, and as such discretion was exercised fairly, we see no reason for the present appeal.

The order must be affirmed, with ten dollars costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.



34	128
84	431

JAMES S. SULLIVAN and Others, Respondents, v. THE SPRING GARDEN INSURANCE COMPANY, Appellant.

*Fire insurance—a policy insuring the owner and also contractors “as interest may appear”—complaint by the contractors which sets forth an insurable interest—the policy creates separate contracts—setting forth the policy in the complaint—consideration for the policy—the printed clauses governed by the written ones.*

A complaint which alleges the issuing of a policy of fire insurance, whereby the “defendant insured one Thomas Behan as owner and Sullivan Brothers, the plaintiffs herein, as contractors, as interest may appear,” against loss by fire, and that, at the time of issuing said policy, and from that time until the loss therein referred to, the plaintiffs had an interest in the said property insured as contractors; that the value of the building and the amount of the plaintiffs’ insurable interest therein at the time of the loss was greater than the loss claimed; that all of said loss fell upon the plaintiffs, they being obliged to, and having restored the building to the condition in which it was immediately prior to said loss without compensation therefor, sufficiently alleges that the plaintiffs had an insurable interest in the property insured.

Under such a complaint the plaintiffs may properly offer evidence at the trial that they were contractors to erect the building; that it was burned; that they were obliged to and did restore it to its previous condition, and that the loss fell upon them.

In such an action, the policy being a contract for the payment of money only, a complaint which sets forth a copy of the policy and contains an allegation of the amount due, together with other allegations as to extrinsic facts showing the loss, is sufficient under section 534 of the Code of Civil Procedure.

Where the complaint alleges, and the policy states, that in consideration of the premium the defendant insured the plaintiffs and the owner as interest might appear, there is a sufficient allegation of a consideration moving from the plaintiffs.

A condition of the policy making it void if the interest of the insured is other than that of unconditional and sole ownership, or if the building be on ground not owned by the insured in fee simple, is controlled by the written portion of the policy, which shows that it was issued to the plaintiffs as contractors for the erection of the building insured, on property owned by the other party insured by the policy.

In an action by the contractors to recover upon the policy, an objection that the owner is not made a party is untenable, as the policy insures two parties “as interest may appear,” thus creating several contracts, one with each of the insured, upon which each may sue without joining the other. This is especially the fact where the complaint alleges that the owner “makes no claim against the defendant.”

APPEAL by the defendant, The Spring Garden Insurance Company, from a final judgment of the Supreme Court in favor of the

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plaintiffs, entered in the office of the clerk of the county of Richmond on the 16th day of May, 1898, with notice of an intention to bring up for review upon such appeal an interlocutory judgment in favor of the plaintiffs, entered in said clerk's office on the 16th day of April, 1898, upon the decision of the court rendered after a trial at the Kings County Special Term overruling the defendant's demurrer to the plaintiff's complaint, and also an order made at the Kings County Special Term and entered in the office of the clerk of the county of Richmond on the 12th day of April, 1898, overruling such demurrer and directing the entry of said interlocutory judgment.

The action was brought to recover upon a policy of insurance by which the defendant insured "Thomas W. Behan as owner, and Sullivan Brothers as contractors, as interest may appear," against loss or damage by fire for the term of one year.

*Walter Large*, for the appellant.

*William M. Mullen*, for the respondents.

GOODRICH, P. J. :

The demurrer is based on the grounds: *First*, that the complaint does not state facts sufficient to constitute a cause of action; and, *second*, that there is a defect of parties plaintiff or defendant, in that Thomas Behan was not made a party. The specific ground of the defendant's demurrer, under the 1st clause of the demurrer, is that the complaint did not allege that the plaintiffs had an *insurable* interest in the premises, or that there was any consideration for the contract, and that the complaint shows a breach of the conditions precedent, without alleging a waiver or excuse for the breach; and under the 2d clause of the demurrer, that Behan should have been made a party because he appears to have an interest in the policy.

The complaint alleges the making and delivery by the defendant, on August 11, 1897, of a policy of fire insurance for one year, whereby the "defendant insured one Thomas Behan as owner, and Sullivan Brothers, the plaintiffs herein, as contractors, as interest may appear \* \* \* against all direct loss or damage by fire or

lightning \* \* \* on the frame building and additions then in the course of erection. \* \* \* Builders' risk granted to complete above-described building. It being agreed that the policy covers lumber and material used for above-described building contained therein, and on the premises adjacent thereto;" that on August 16, 1897, the building was struck by lightning, whereby the property insured was damaged and destroyed to the amount of \$1,552.08, and that, at the time of issuing said policy, and from thence until the loss herein referred to, the plaintiffs had an interest in the said property insured as contractors; that the value of the building and the amount of the plaintiffs' insurable interest therein at the time of the loss was greater than the loss claimed therein; that all of said loss fell upon the plaintiffs, they being obliged to and having restored the building to the condition in which it was immediately prior to said loss, without compensation therefor, and that the owner of said building makes no claim against the defendant.

The complaint further alleges the delivery of proofs of loss and a compliance with all the terms and conditions of the policy.

The policy, by consent of the parties, is printed in the record, and is to be considered a part of the complaint.

The first objection of the defendant is that the complaint does not allege an insurable interest. We hold otherwise. The policy speaks of the plaintiffs' interest as that of a contractor on building in the course of erection, with a builder's risk clause. The complaint alleges that the plaintiffs had an interest as contractors in the building; that the amount of the plaintiffs' insurable interest and the damage to the building was greater than the sum for which judgment was demanded, and that the plaintiffs were obliged to and had restored the damaged building.

It seems to be conceded by the appellant's counsel that if the word "insurable" had been inserted before the word "interest" the allegation would be sufficient. The case of *Ruse v. The Mutual Benefit Life Ins. Co.* (23 N. Y. 516), which he cites, was an action on a life insurance policy, where it is elementary that an insurable interest must be alleged and proved. On the other hand, in *Fowler v. The New York Indemnity Insurance Co.* (26 N. Y. 422), also cited by the appellant's counsel, a demurrer to a complaint was sustained on the ground that "the radical defect in the complaint is

that it contains no averment of interest, either in the plaintiff or in his assignor, in the subject-matter of the insurance."

The only case which I can find which gives color to the appellant's contention is *Freeman v. The Fulton Fire Ins. Co.* (38 Barb. 247), where the court said (p. 259) that "under the statute of betting and gaming \* \* \* a policy of fire insurance is void, unless the party insured has at the time an insurable interest in the property insured. It follows that a complaint in an action on the policy must contain an averment of such an interest, in order to state a cause of action." But the plaintiff in that action was not named in the policy, and it was necessary to connect him with it by alleging an insurable interest. It may be observed, also, that the opinion lays no stress upon the use of the word "insurable." In another part it refers simply to the necessity of an allegation of interest in the property, and does not use the word "insurable."

In *Frink v. The Hampden Ins. Co.* (1 Abb. Pr. [N. S.] 343), MILLER, J., in stating what the *Freeman* case had decided, says that the complaint must allege an interest in the thing insured, and leaves out the word "insurable."

But we think the allegations of the complaint are sufficient to show, not only an interest, but an insurable interest, and that under them the plaintiffs can offer evidence at the trial that they were contractors to erect the building; that it was burned; that they were obliged to, and did, restore it to its previous condition, and that the loss fell upon them. This constitutes insurable interest. It may be that the complaint might have been the subject of a motion to make more definite and certain, but that does not affect the sufficiency of the complaint as it stands. The complaint also seems to be in accord with section 534 of the Code of Civil Procedure, as, under the agreement of the parties, the policy is to be considered a part of the complaint. The policy is a contract for the payment of money only, a copy of it is set out, and the complaint alleges the amount due. This, with other allegations as to extrinsic facts showing the loss, constitutes a proper setting out of a cause of action under that section.

The next objection is that the complaint does not allege any consideration for the contract proceeding from the plaintiffs. We think otherwise. The complaint alleges, and the policy states, that, in

consideration of the premium, the defendant insured the plaintiffs and Behan, as interest might appear. This is a sufficient allegation of consideration.

The objection that the complaint shows a breach of the conditions precedent is based upon a printed clause which makes the policy void if the interest of the insured is other than that of unconditional and sole ownership, or if the building be on ground not owned by the insured in fee simple. On elementary rules this condition must be controlled by the written portion of the policy, which shows its issue to the plaintiffs as contractors for the erection of a building on the property owned by Behan.

Section 533 of the Code of Civil Procedure provides that, in pleading a condition precedent, it shall not be necessary to state the facts constituting performance, but the party may state, generally, a performance; and if the allegation is controverted he must, on the trial, establish performance. The allegations of the complaint in this respect are in strict compliance with this section of the Code, and it remains for the defendant to controvert them if it desires to raise an issue thereon.

The final objection is that Behan should have been made a party. The policy insures two parties, "as interest may appear." This creates in fact several contracts, one with each insured, upon which either may sue without joining the other. Some of the cases cited by the appellant's counsel are those where the plaintiff was not named in the policy. None of them relate to a contract like the present one.

In addition to this, there is an issuable allegation that Behan "makes no claim against the defendant." It may be that the use of the word "makes" is not so accurate as would have been that of some other word, but it is sufficient. If this is an untrue allegation, and the defendant ought to know whether any such claim has been made upon it, the law affords the remedy of interpleader.

We think none of the objections to the complaint are ground of demurrer, and that the judgment should be affirmed.

All concurred.

Judgment affirmed, with costs.

HOLLAND EMSLIE and RICHARD EMSLIE, Respondents, v. EDWARD LIVINGSTON, Appellant.

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151 629

*Building contract — a written adjustment of differences between the parties thereto is conclusive in the absence of fraud — what is an unliquidated claim.*

Where differences between the parties to a contract for the building of a house result in an adjustment of accounts, in evidence of which the contractors execute a writing stating an amount received by them and the balance due, namely, \$4,046.23, and adding, "leaving the utmost that we can call upon you to pay us four thousand and forty-six 23-100 dollars, less the value of" certain materials on the premises, the value of which was to be credited to the owner, and concluding with the statement, "All extras have been adjusted between us, and no more will be charged to you unless you order them in writing," the contractors cannot, in an action subsequently brought by them against the owner, show that bills which were rendered prior to the settlement, and were partly for extra work done by them, were not included in the original contract and were not adjusted by the compromise agreement, there being no proof of fraud or misrepresentation sufficient to invalidate the compromise agreement. Where no fixed price is stated in a contract for the performance of work, but there is a limit beyond which the party ordering the work cannot, by the terms thereof, be held liable, the claim for work done thereunder falls within the category of an unliquidated demand.

APPEAL by the defendant, Edward Livingston, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Orange on the 1st day of April, 1898, upon the report of a referee.

*L. Laflin Kellogg* [*Alfred C. Petté* with him on the brief], for the appellant.

*John Miller*, for the respondents.

GOODRICH, P. J. :

The defendant was the owner of certain premises at Highlands, in the county of Putnam. There was on the premises a house partly built by a contractor who had failed to complete his contract. On February 29, 1896, the defendant made a written contract with the plaintiffs, whereby they agreed to complete the house according to annexed plans and specifications, the work to be completed on May twenty-fifth. "The work to be done on the basis of actual net

cost for material and labor, and ten per cent profit." The plaintiffs guaranteed that the total cost should not exceed \$12,596, including the ten per centum profit. They also agreed to do what work was necessary to complete the stable in accordance with the specifications and plans, "for actual cost and ten per cent, as in the case provided for the house." The first payment was to be made for work done to April first, as soon as account and vouchers were examined and approved, less ten per centum to be retained till final settlement. A second payment was to be made on May first, on the same basis, and the third and final payment on completion and acceptance of the whole work. The plaintiffs began their work, and on March thirty-first rendered an account amounting to \$3,398.25, which the defendant paid. A second account was rendered on May first, amounting to \$4,480.05, from which was deducted \$809.79 for a bill of J. L. Mott & Co., included in the account, which had been paid by the defendant, and the balance of \$3,670.26 was paid.

On June first the plaintiffs rendered two other accounts for \$3,263.27 and \$180.92, and these were included in a subsequent account rendered on June ninth, amounting in all to \$5,222.63. The defendant declined to pay the account of \$3,263.27, and the plaintiffs stopped their work and removed their materials from the premises. Negotiations between the parties followed which, as the defendant contends, resulted in a settlement of differences, and on or about June tenth several papers were executed in evidence of the adjustment. One of them, signed by the plaintiffs, stated that by the original contract they had agreed to finish the house at a sum not exceeding \$12,596, and had received on account \$8,459.77, leaving a balance due of \$4,046.23, "leaving the utmost that we can call upon you to pay us four thousand and forty-six 23/100 dollars, less the value of" certain materials which were on the premises, the value of which was to be credited to the defendant. There was also some difference on account of mantels, which apparently was afterward adjusted between the parties at \$37.90 due the plaintiffs. The paper concludes with the statement, "All extras have been adjusted between us, and no more will be charged to you unless you order them in writing."

The second paper stated that when the plaintiffs returned the removed materials the defendant should pay them \$1,000 "towards

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the contract amount due on the work and material done on and furnished for said house." This payment was made on June fifteenth.

The third paper was a bond of the plaintiffs to carry out the first described of the three papers.

A fourth paper was signed by the plaintiffs in which they acknowledged receipt of \$473.56, which was stated to be "for the work done and material furnished at house and stables," the items being given of work to both house and stable. This document contained a clause stating that, in consideration of one dollar, "we hereby waive and relinquish any other claim we may have for extra work."

A fifth paper was signed by Mr. Anthony, the attorney of the defendant, which stated that he had received from the defendant three checks, for \$473.56, \$226.16 and \$2,300, amounting in all to \$2,999.72, which he was to deliver to the plaintiffs upon the return of the materials removed by them, and these checks were delivered to the plaintiffs on June thirteenth. This check for \$226.16 seems to have been intended as payment for another bill which was rendered by the plaintiffs on June first for work done on the stable. There is also a receipt of the plaintiffs for \$1,000 dated June fifteenth.

Thus it appears that of the amount of \$4,046.23, stated in the plaintiffs' memorandum of June sixteenth, there was paid \$3,300, leaving due the \$746.23, which was the "utmost" that could be claimed by the plaintiffs. This was subject to some further deductions not necessary to be considered here.

During June and July several written orders were given by the defendant for work on the house and stable, to cost respectively seven dollars, one dollar, forty-two dollars and seventy cents, four dollars and four dollars and fifty cents, amounting in all to fifty-nine dollars and twenty cents. All of them were written on one sheet, which contains a statement signed by one of the plaintiffs, "I shall hold my men responsible for any work done outside of that included in contract unless order is given on this sheet and signed by architect."

The plaintiffs subsequently did other work on the premises and claimed that they had fulfilled their contract, which the defendant denied, and this action was commenced. The complaint set up the execution of the contract of February twenty-ninth, of which a copy



was annexed, alleged performance and the failure of the defendant to pay the moneys due thereon; that the defendant was indebted to the plaintiffs for the work, labor and services, care and diligence of those plaintiffs and their servants, and for material in completing the house and stable of the defendant and for extra work and materials for the doing of other work and performing other services and supplying other materials amounting to \$17,304.73. It also alleged a further indebtedness of \$1,730.42, being the ten per centum named in the contract. The plaintiffs did not allege any payments on account, but demanded judgment for \$7,057.36 and interest.

The answer denied that the plaintiffs had completed their contract and set up the transaction of June tenth as a settlement and adjustment of accounts; that of the \$4,046.23 named in the papers then executed payments of \$3,448.87 had been made, and as a counterclaim alleged the loss of the use of the premises by reason of the failure of the plaintiffs to complete, amounting to \$1,179.87, and that by the agreements of June tenth the total amount of extra work done or to be done was fixed at \$473.36, which was paid.

The issues were referred. The referee has written no opinion, and we are in doubt as to the reasons for his decision. He finds, however, the making of the contract of February twenty-ninth; that the plaintiffs have substantially fulfilled the same except as modified by subsequent agreements between the parties; that the defendant is indebted for work on the house named in the plans and specifications, \$12,596, and "for work on stable and extra work not in the contract," \$4,432.30, with ten per centum on the same, \$443.23, amounting to \$4,875.53, these sums amounting to \$17,471.53, upon which has been paid \$12,890.25, leaving due \$4,581.28, for which sum with interest he directed judgment for the plaintiffs. He makes no reference to the transactions of June tenth.

It is very evident from the report of the referee that he has entirely ignored the effect of the transactions of June tenth, which seem to us to form a settlement and adjustment of all matters between the parties up to that date, and to be the basis upon which the rights of the parties are to be determined. There had been a disagreement between them as to whether the original contract had been performed; negotiations ensued between the parties and they adjusted their accounts up to that date on a new basis. For all

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transactions prior to that date the accounts between them were adjusted and agreed upon. But the referee permitted evidence to be introduced by the plaintiffs showing that in the bills which were rendered on March thirty-first, May first and June first and ninth, there were about a hundred items which were partly for extra work done by the plaintiffs and which were not included in their contract and not adjusted by the agreements of June tenth. Of these items in reference to which evidence was admitted, one may be given as an example. In the account of March thirty-first was an item, "Labor at building from Mar. 2 to April 1, 1896, \$339.50." The evidence of the plaintiffs was received over the objection and exception of the defendant, to show that this item included "\$84 of extra work \* \* \* not called for by the specifications." The admission of such evidence constitutes reversible error. Part of this work thus held to be extra work was evidently work done upon the house, irrespective of other work done upon the stable. But the parties on June tenth agreed that the "utmost" amount due from the defendant for all such work done upon the house was \$4,046.23. This included all bills which had been rendered up to that date. The evidence which the referee thus admitted violated plain principles of law.

It is well settled that where a demand is unliquidated and where there is a *bona fide* disagreement in regard to a debtor's liability, the law favors an adjustment of such controversies without judicial intervention. (*Fuller v. Kemp*, 138 N. Y. 231.)

In *Nassoiz v. Tomlinson* (148 N. Y. 326, 330) the court said: "If the claim is unliquidated, the acceptance of a part and an agreement to cancel the entire debt, furnishes a new consideration which is found in the compromise. A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction."

The record shows that the case at bar falls within the category of unliquidated demands. There was no fixed price in the contract for the performance of the work, but there was a limit beyond

which the defendant could not be held liable. There was a *bona fide* dispute between the parties as to the meaning of the contract and the amount due thereunder, and the parties met and adjusted the amount due. The plaintiffs executed agreements which stated such amount, and they agreed that they could not and would not demand any greater sum. The plaintiffs cannot be permitted, in the absence of fraud or misrepresentation, to invalidate this agreement of compromise, which seems to have been executed after careful consideration.

The judgment must be reversed and a new trial granted, with costs to abide the event.

All concurred.

Judgment reversed and new trial granted before a new referee to be appointed at Special Term, costs to abide the event.

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THE EXEMPT FIREMEN ASSOCIATION OF LONG ISLAND CITY, Respondent, v. THE TRUSTEES OF THE EXEMPT FIREMEN'S BENEVOLENT FUND OF LONG ISLAND CITY, Appellant, Impleaded with LUCIEN KNAPP, Defendant.

*Long Island City* — chapter 141, *Laws of 1896*, relating to the tax on foreign insurance companies, is a "special city law" — it was not legally passed.

Chapter 141 of the *Laws of 1896*, providing that the percentage or tax to be paid by foreign fire insurance companies on insurance on property in Long Island City "shall be paid to a corporation to be hereafter formed, known as 'the Trustees of the Exempt Firemen's Benevolent Fund of Long Island City,'" comes within the designation of a "special city law," and not having been transmitted for acceptance by that city, under section 2 of article 12 of the Constitution of the State of New York, is void.

APPEAL by the defendant, The Trustees of the Exempt Firemen's Benevolent Fund of Long Island City, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 9th day of June, 1898, overruling the said defendant's demurrer to the complaint

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interposed on the ground that it did not state facts sufficient to constitute a cause of action.

*Charles A. Webber*, for the appellant.

*George A. Gregg*, for the respondent.

GOODRICH, P. J. :

The plaintiff brings this action contending that, by chapter 370 of the Laws of 1890, it is entitled to the moneys collected by the former treasurer of Long Island City, under the provisions of chapter 604 of the Laws of 1886, amending chapter 465 of the Laws of 1875, from foreign insurance companies doing business in such city. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and from the interlocutory judgment entered thereon the defendant corporation appeals.

The appeal must turn upon the question whether chapter 141 of the Laws of 1896, entitled "An act to provide for the application and distribution of receipts from premiums collected, and to be collected, from foreign fire insurance companies doing business in the State under and pursuant to chapter six hundred and four of the laws of eighteen hundred and eighty-six, on insurance on property in Long Island City," was duly passed in accordance with the provisions of article 12, section 2, of the Constitution.

This State, in 1814, prohibited insurance within the State by foreign corporations or persons (Chap. 49, Laws of 1814), and this was embodied in the first five editions of the Revised Statutes, the last of which was published in 1859. Each of these editions, however, contains in the same title a provision (seemingly in conflict with such prohibition) which required all such persons or corporations to pay into the State treasury a certain percentage of their premiums.

In 1849 the Legislature passed an act requiring the payment, to the treasurer of the fire department of the city of New York, for the use and benefit of said fire department, by every person acting in such city on behalf of any individual or association of individuals not incorporated by the laws of this State, to effect fire insurance in such city, of two per centum upon all premiums for insurance in such city. (Chap. 178, Laws of 1849.)

In 1875 another act was passed, providing for the payment of such sums to the treasurer of the fire department of every city or incorporated village of the State "for the use and benefit of such fire department." (Chap. 465, Laws of 1875.)

In 1886 this act of 1875 was further amended so as to extend its provisions to unincorporated villages having a fire department. (Chap. 604, Laws of 1886.)

It will be observed that all of the foregoing legislation provided for the payment of the tax to the treasurer of the fire department of the city or village, or, if there was no such officer, to the treasurer or financial officer of the city or village, for the use and benefit of the fire department.

The record does not contain any statement as to the time of the incorporation of the Exempt Firemen Association of Long Island City, the plaintiff in this action, but it must have been previous to 1890, when an act was passed providing that such corporation "shall be entitled to receive, and there shall be paid to it, all moneys now or hereafter collected from the percentage or tax on the receipts of foreign insurance companies from premiums on insurance on property in Long Island City," as provided by the act of 1886, to be applied by it "To visit and provide for sick and distressed members, to bury deceased members and protect and provide for the widows and orphans of deceased members of said corporation." (Chap. 370, Laws of 1890.)

Under this act the plaintiff collected from the treasurer of Long Island City the moneys which had been collected by him under the acts in question.

Such being the condition of affairs in 1896, the Legislature passed another act (Chap. 141, Laws of 1896) which constitutes the subject of the present appeal. This act provided that the percentage or taxes before mentioned "shall be paid to a corporation to be hereafter formed, known as 'the trustees of the exempt firemen's benevolent fund of Long Island City.' Said corporation is to be composed of the president and two vice-presidents of the associations in said city known as 'the Exempt Firemen's association,' 'the Veteran Fireman's association' and 'the Volunteer Fireman's association,' together with the city treasurer and receiver of taxes of said Long Island City, and the city treasurer shall be the treasurer of said

corporation. All returns and undertakings in respect to the tax created by the provision of chapter six hundred and four of the laws of eighteen hundred and eighty-six, on premiums of insurance on property in said city and required by said act, shall be made to and filed with the treasurer of said corporation."

The plaintiff contends that such act falls within the designation of a "special city law," under article 12, section 2, of the Constitution, and that, the provisions of such section not having been complied with, the act was not validated as a law.

Section 2, article 12 of the Constitution classifies cities into three classes according to population, and provides as follows:

"Laws relating to the property, affairs or government of cities, and the several departments thereof, are divided into general and special city laws; general city laws are those which relate to \* \* \* one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class. Special city laws shall not be passed except in conformity with the provisions of this section. After any bill for a special city law, relating to a city, has been passed by both branches of the Legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and within fifteen days thereafter the mayor shall return such bill to the house from which it was sent, or if the session of the Legislature at which such bill was passed has terminated, to the Governor, with the mayor's certificate thereon, stating whether the city has or has not accepted the same. \* \* \* In every special city law which has been accepted by the city or cities to which it relates, the title shall be followed by the words 'accepted by the city,' or 'cities,' as the case may be; in every such law which is passed without such acceptance, by the words 'passed without the acceptance of the city,' or 'cities,' as the case may be."

The title of the act in question in the Session Laws is followed by the words: "Became a law March 27, 1896, with the approval of the Governor. Passed, a majority being present." It does not contain either of the phrases, "accepted by the city," or "passed without the acceptance of the city." We must assume, therefore, that the act was never transmitted to the mayor of Long Island City.

There can be no question that the legislation whose history has been recited related to the property and affairs of Long Island City.

The early acts directed the payment of the tax collected from the company into the State treasury. The later acts directed the payment to the city treasurer, and the still later acts devote the money to the use of a special department of the city. The final acts divert the moneys from the treasury and direct their payment by the city treasurer to corporations organized for benevolent purposes connected with persons who have served in the department. If such legislation does not relate to the property and affairs of a city, it would be difficult to frame an act which would have that effect.

It is, however, only with the act of 1896 that we are concerned, for the act of 1890 was passed previously to the constitutional provision in question. When the Constitution of 1894 went into effect the situation was this: The city was authorized to collect the tax from the foreign insurance companies. It had been directed to pay the money over to the plaintiff. Until such payment was made the money remained the property of the city. Even if this were not so, it was a part of its affairs to secure the proper appropriation of the money according to the terms of the act of 1890, for the benefit of exempt firemen who had been in its service.

A very interesting and exhaustive review of the history of firemen and exempt firemen's associations and the duties of the public to them will be found in the opinion of FINCH, J., in *Trustees of Exempt Firemen's Fund v. Roome* (93 N. Y. 313), where the court held that while firemen are not civil or public officers, they must yet be regarded as the agents of the municipal corporation, and that certain exemptions conferred upon firemen by acts of the Legislature "went upon the principle that an active and dangerous service for a term of years was not more than balanced by the exemption for life from lighter and less onerous duties; that further compensation for excess of public burdens faithfully borne was the just due of the firemen, and so set the example of a benefit continued because of the service after the service had been ended." The opinion declares that out of this condition arose the association of exempt firemen in the city of New York. The court referred to and approved the definition of the association as "a charitable department of the city government," which Mr. Justice INGRAHAM had given to it in *Fire Department of the City of New York v. Noble* (3 E. D. Smith, 440).

It is clear from a reading of this opinion that the court considered legislation for the benefit of exempt firemen's associations of cities as matter connected with and relating to the affairs of such cities. This being so, the Constitution required the transmission to the mayor of Long Island City of the act of 1896; and as there was no such action there was no compliance with the constitutional provision referred to.

In *Trustees v. Exempt Firemen Association* (22 App. Div. 564) the constitutionality of the act in question was assailed by the present plaintiff, and this court stated that it deemed it unnecessary to discuss the questions thus raised. The decision was based on other grounds, but the court held inferentially that the moneys referred to in the act were to be collected by the city authorities. A motion was made for a reargument, based upon the ground "that the decision of the appeal herein is based upon a misapprehension of fact, to wit, that the tax upon foreign insurance premiums since 1890 has been collected by the city authorities of Long Island City and then paid over to the defendant, which is not so, the fact being that said tax was collected directly from the companies by the defendant and is now so collected by the plaintiff," but the court denied the motion "on the ground that the statutes in question plainly contemplated the collection of the moneys by the city authorities in the first instance." (*Trustees v. Exempt Firemen Association*, 23 App. Div. 626.)

It is our opinion that the act of 1896 in question is within the provisions of section 2, article 12 of the Constitution, and should have been transmitted to the mayor of Long Island City; and as it appears by the Session Laws that there was no such transmission, and neither acceptance nor non-acceptance by the city, we hold that the act was not passed in accordance with the provisions of section 2 of article 12 of the Constitution, and is, consequently, invalid.

It follows that the interlocutory judgment must be affirmed.

All concurred.

Interlocutory judgment affirmed, with costs.



WILLIAM FERRIS and MARY A. BYRNE, as Administrators, etc., of MARY A. FERRIS, Deceased, Appellants and Respondents, v. EUGENE FERRIS, JR., Individually and as Executor, etc., of EUGENE FERRIS, Deceased, Respondent and Appellant.

*Release executed by a mother to her son — what evidence will rebut the presumption of undue influence.*

The presumption adverse to the validity of a release executed by a mother to her son, discharging him from any obligation to her estate — his relation to which was that of an agent, involving an element of trust, and necessitating proof on his part that no undue influence was used — is overcome by evidence establishing the mother's long and happy home life with the son and his family during her ten years of widowhood, and her strong and constantly growing affection for him as compared with her other children.

CROSS-APPEALS by the plaintiffs and the defendant from portions of an interlocutory judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 21st day of April, 1898, upon the decision of the court rendered after a trial at the Kings County Special Term.

The plaintiffs appeal from so much of said judgment as adjudges that they are not entitled to any other or further relief than is awarded therein, and the defendant appeals from every other part of said judgment.

The action was brought by the administrators of Mary A. Ferris, deceased, against her son Eugene Ferris, Jr., for an accounting. A statement of the facts of the case as follows is prefixed to the opinion of the court at Special Term :

"The said Mary A. Ferris died intestate in January, 1897. Her husband, Eugene Ferris, died in April, 1887. They resided in Brooklyn. Five children, two of them sons (the defendant being one of them), survived the said parents. A son of a deceased son also survived them. The daughters were all married. One lived in Washington, D. C., one in Atlantic City, N. J., and one in Brooklyn. The sons were both married and lived in Brooklyn. The defendant was thirty-one years old when the father died. He was in business with his father as partner. He had always lived with his parents, and continued to do so after his marriage, and when his

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father died, he and his wife and children and his mother continued as one family in the same house, which was owned by the father. The defendant has eight children. The father also owned a summer residence, a bond and mortgage for \$3,000, and a lot and building in New York city worth about \$100,000, in the store of which he and the defendant carried on their said business. The value of the said other real estate is not given. By his will the father left all of his estate to his widow for life. To the defendant he left the said business and the use of the said store, for which he was required to pay a rent of \$2,400 a year to the widow. Upon the death of the widow the entire estate was given to the defendant, except a legacy of \$10,000 to each of the said daughters, of \$5,000 to the son William, of \$5,000 to the said grandson, and of \$1,000 to a niece. The defendant was thus given more than half of the estate. The widow and the defendant were named executors, and upon her death the settlement of the estate was intrusted to him. The collection of the income during the life estate was not intrusted to the executors by the will. The widow intrusted such collection and the management of the estate to the defendant. He collected about \$200 a month of income, besides the rent for the said store due from him, making him chargeable with about \$4,800 a year during the ten years of the life estate. Of this he gave the widow about \$1,800 a year. He also occupied the said two residences with her without paying anything therefor. She executed three general releases to him on account of any obligation or indebtedness by him to her growing out of such relation, viz., one on May 6, 1891; one on October 7, 1893, which was confirmed on December 7, 1893, and one on January 13, 1896, and they are pleaded as defenses. They are in terms for sums stated, and love and affection. The defendant was very low in sickness, and not expected to recover, when the second was executed, and it recites that fact. They were prepared by the defendant's attorney, and he had each executed. The mother was on affectionate terms with the defendant and his wife and children, and the household was happy and harmonious. The great preference given to the defendant by the father's will caused some coldness toward him by the other children, and with the exception of the one daughter that lived in Brooklyn, they seldom saw their

mother. They all had free access to her. She was affectionate to all her children, and made regular presents of money to her daughters, and also made a gift *causa mortis* to one of them of \$500 when ill a year before she died. She was eighty-six years old when she died. She was of a somewhat delicate and feeble habit of body, but she was an intelligent woman, and her intellect was not impaired."

The court held that the releases mentioned in the above statement of facts were effective to discharge the defendant from liability up to January 13, 1896, as to all matters in controversy except the interest on the \$3,000 mortgage. On this appeal the plaintiffs contend that no effect at all should have been given to the releases; while the defendant insists that they operated to relieve him from liability for the mortgage interest as well as in respect to the other matters of his father's estate.

*Josiah T. Marean*, for the plaintiffs.

*Peter Condon*, for the defendant.

PER CURIAM:

The learned judge at Special Term held in substance that the relation between the defendant and his mother in reference to the estate of her deceased husband was an agency involving an element of trust, the bare proof of which raised a presumption adverse to the releases, making it incumbent upon the son to show affirmatively, in the language of *Cowee v. Cornell* (75 N. Y. 91), "that no deception was practiced, no undue influence used, and that all was fair." He was of the opinion, however, that the defendant had sustained the burden of overcoming this presumption by the evidence which he offered of his mother's long and happy home life with him and his family during her ten years of widowhood, and her strong and constantly growing affection for the defendant as compared with her other children, which the learned judge deemed only natural under the circumstances disclosed by the proof. Counsel for the plaintiffs concedes that great affection is always a sufficient explanation of testamentary dispositions. If its existence is satisfactorily proved — and we cannot say that it was not so proved in this case — we are unable to see why it may not also suffice to

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remove all suspicion of unfairness concerning dealings *inter vivos* by which property rights are affected.

In this view there is no ground for disturbing the judgment so far as the plaintiffs have appealed from it. We think that the defendant is right, however, on his appeal in the contention that the releases should have been adjudged effective to discharge him from liability for interest on the \$3,000 mortgage up to the date of the latest release. The award of costs against the defendant at this time must also be stricken out, as the judgment is only interlocutory, and the case is not that provided for in section 3232 of the Code of Civil Procedure.

All concurred.

Interlocutory judgment modified so as to exclude from the accounting thereby directed the item of interest on the \$3,000 mortgage except for a period subsequent to January 13, 1896; also further modified by striking therefrom the award of costs to the plaintiffs; and as thus modified, interlocutory judgment affirmed, without costs of this appeal to either party.

In the Matter of JANE A. PORTER, an Incompetent Person.

WILLIAM B. PUTNEY, as Committee of the Person of JANE A. PORTER, an Incompetent Person, Respondent, *v.* BENJAMIN FLAGLER, as Committee of the Estate of JANE A. PORTER, an Incompetent Person, and Others, Appellants.

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80	1328

*Committee of an incompetent person — residence of the incompetent within section 2323, Code of Civil Procedure — an order made in the wrong district is irregular, not void.*

Under section 2323 of the Code of Civil Procedure, requiring an application for the appointment of a committee of an incompetent person, when made to the Supreme Court, to be presented at a Special Term thereof, held within the judicial district where the incompetent resides, or to a justice of the court within such district, the residence of the incompetent is her legal residence, and her temporary domicile in another county does not operate to change it.

An order of the Supreme Court, not made in the proper judicial district, is, however, not void, but only irregular; and on an application of relatives of

the incompetent, to whom notice of the proceeding has been given, under section 2325 of the Code of Civil Procedure, an order will be made that the proceeding be relegated to the county of her legal residence.

APPEAL by the defendants, Benjamin Flagler, as committee of the estate of Jane A. Porter, an incompetent person, and others, relatives of the said Jane A. Porter, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 4th day of October, 1898, appointing a committee of the person of Jane A. Porter, an incompetent person; also from an order made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 4th day of October, 1898, conditionally continuing an injunction restraining the defendants from prosecuting any further proceedings in Niagara county for the appointment of a committee of her person and estate; and also from an order made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 4th day of October, 1898, denying their motion to relegate the proceedings to the county of Niagara.

*Louis Marshall* [*T. E. Ellsworth, John E. Pound* and *L. A. Spalding* with him on the brief], for the appellants.

*W. B. Putney*, for the respondent.

CULLEN, J.:

In 1886, Miss Jane A. Porter was, in proceedings instituted in the county of Niagara, declared an incompetent person, and Benjamin Flagler, of that county, was appointed committee of her person and estate. At this time, Miss Porter was a resident of the county of Niagara, and had resided in that county from the time of her birth. The bulk of her estate consisted of realty situated in that county. Mr. Flagler qualified as committee, and assumed the control of the person and estate of Miss Porter. In 1897 a proceeding was instituted in Niagara county to supersede the commission. A reference was had and testimony taken, with the result that the application was denied. The immediate custody of Miss Porter was, of late years, intrusted by her committee to Mrs. O'Connor, a cousin of the incompetent person, who resided in Queens county. In March, 1898, a petition on behalf of Miss Porter was presented to the

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Special Term of this court, held in the borough of Brooklyn, praying for the appointment of a new committee of her person in place of Mr. Flagler, and an order was granted by the Special Term directing Mr. Flagler to show cause why the prayer of the petitioner should not be granted. On the return of the order to show cause, an order was made appointing a referee to take proof as to a proper person to be appointed a committee of the person in the place of Mr. Flagler, and the referee was directed to give notice of the hearings to the relatives of Miss Porter. In pursuance of this order, the referee took evidence and made his report. An order was then made that the parties show cause why the report of the referee should not be confirmed and a new committee of the person appointed. This order was returnable in Kings county and was served on the relatives of the incompetent person, a majority of whom resided in the county of Niagara or in the eighth judicial district. At the time appointed for the return of this order the committee, Mr. Flagler, and the relatives of Miss Porter, moved, on notice, that the proceeding be transferred to the county of Niagara. This application was denied. The report of the referee was confirmed and a new committee of the person appointed. From the two orders made on these applications appeals have been taken to this branch of the court.

During the pendency of these proceedings the relatives of Miss Porter obtained an order from a Special Term in the eighth judicial district restraining the further prosecution of the proceedings. This stay was vacated by this division of the court. (*Matter of Porter*, 30 App. Div. 251.) Subsequently Mr. Putney, who had been appointed temporary committee of the person of Miss Porter, brought an action in the Supreme Court against the committee of her estate and her relatives, seeking, among other things, to enjoin the prosecution of any proceedings in Niagara county. A temporary injunction was granted, which was continued on the return day. The third appeal before us is from the order continuing the injunction.

The first claim of the appellants is that the proceedings instituted in Queens county are void, because the incompetent person was not a resident of that county. We agree in the proposition that the legal residence of Miss Porter was in the county of Niagara, and

that her temporary domicile in Queens county did not operate to change her previous residence. Section 2323 of the Code of Civil Procedure prescribes that an application for the appointment of a committee, when made to the Supreme Court, must be presented at a Special Term within the judicial district where the incompetent resides or to a justice of the court within such district. We are of opinion that the rule prescribed by this section of the Code equally applies to subsequent proceedings instituted in reference to the person or estate, even though these proceedings are to be deemed as new, original and independent proceedings. This rule was violated in making the application to a Special Term in the county of Kings. But it does not follow that the proceedings are void. The custody and control of incompetent persons and their estates was originally vested in the Court of Chancery, the powers of which court were, by the Constitution of 1846, devolved on the Supreme Court. The mode of its exercise is subject to the statutory provisions on the subject contained in the Code of Civil Procedure. (*Matter of Blewitt*, 131 N. Y. 541.) But there is only one Supreme Court, and these statutory provisions as to where or to what terms of the court application shall be made do not limit the jurisdiction of the court, but relate merely to practice. Therefore, an order not made in compliance with these provisions is not void, but only irregular or erroneous. In *People ex rel. Platt v. Rice* (144 N. Y. 249) it was sought to punish the defendants for violation of an order for a mandamus directed by the Special Term. The defendants were State officers, and by section 605 of the Code of Civil Procedure the order could have been properly made only by the General Term. Though the defendants had stipulated to abide by the decision of the Court of Appeals in review of the order, it was alleged that the order was made without jurisdiction in the court. In answer to this claim, it was said by Judge GRAY: "It is true that jurisdiction cannot be conferred by consent of parties; but a question relating to the authority of a branch of the court to make the particular order may be effectually waived. The Supreme Court had jurisdiction of the parties, although the authority to order the writ of mandamus may have been vested in the General Term." In *City of Brooklyn v. The Mayor* (25 Hun, 612) a statute directed that the Supreme Court in the first judicial district, the Court of Com-

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mon Pleas and the Superior Court of the city of New York should have exclusive jurisdiction of all actions and special proceedings against the mayor, aldermen and commonalty of that city. It was held that the statute could not operate to deprive the Supreme Court of jurisdiction, but was good as a statute relative to venue. In that case the defendants had previously interposed a demurrer on the ground that, the action being brought in Kings county, the court had no jurisdiction. This demurrer was overruled.

But though the proceedings instituted in this district were not void, still, whenever the question was raised, full effect should have been given to the provisions of the Code prescribing where and how applications in those proceedings should be made. It is no answer to this to say that the relatives of Miss Porter, who raised the objection that the proceeding should be relegated to the county of Niagara, were not necessary parties to the proceeding. Under the Code (§ 2325) in proceedings of this character, the court may direct to what relatives of the incompetent person notice shall be given. The court exercised this discretion and directed that the relatives should receive notice, and, therefore, be made parties to the proceeding. We must assume that the discretion was properly exercised and the direction properly made. Being thus parties to the proceeding, the objectors have the same rights as any other party. Nor is it to be said that the question is merely one of comity, a comity not to be indulged in at the expense of the incompetent person. We think it is much more than a question of comity. It is a question of the orderly administration of justice. At the commencement of these proceedings there was threatened a conflict of judicial authority, arising from orders made in the second judicial district and others made in the eighth judicial district. That there might be no such unseemly conflict, we felt constrained to summarily vacate the injunction order granted in the county of Erie. (*Matter of Porter, supra.*) The same reason that dictated our previous action seems to have equally required that these proceedings should have been remitted to the county of Niagara.

We think, therefore, that the order confirming the report of the referee and appointing a committee of the person should be reversed, and the hearing on the application for such an order transferred to the eighth judicial district, except that the direction in the order



that Judge Reynolds be appointed committee of the person, and that certain monthly payments be made to him for the support of the incompetent person, be continued in force until the final order of the court in the premises; the order denying the motion of the relatives to relegate the proceedings to the county of Niagara should be reversed and the application granted; and the order continuing the injunction made in the action should be reversed and the injunction vacated; ten dollars costs on each of these appeals, and the disbursements of the appeal, should be allowed to the appellants, to be paid out of the estate of the incompetent person.

All concurred.

Order confirming report of referee appointing committee reversed, and hearing on application for such order transferred to the eighth judicial district, except that the direction of the order that George G. Reynolds be appointed committee of the person, and that certain monthly payments be made to him for the support of the incompetent person be continued in force until the final order of the court in the premises; order denying motion to relegate the proceedings to the county of Niagara reversed and motion granted; order continuing the injunction reversed and injunction vacated; ten dollars costs on each appeal, and the disbursements of the appeal, allowed to the appellants, to be paid out of the estate.

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JAMES McKENNA, Respondent, v. THE CITY OF NEW YORK,  
Appellant

*Greater New York charter, section 1373 — assistant clerk in the court of a justice of the peace in the city of Brooklyn — when his term expires — not affected by any action of the board of estimate and apportionment.*

An assistant clerk in the court of the justice of the peace of the first district of the city of Brooklyn, appointed under section 14 of title 21 of the charter of the city of Brooklyn (Chap. 523, Laws of 1888), assuming that he is continued in office by section 1373 of the Greater New York charter (Chap. 378, Laws of 1897), is subject to the limitation contained in that section, that there shall be in each district in the borough of Brooklyn an assistant clerk, under which provision the justice may designate but one assistant clerk; and the offices of

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36	519
34	152
100a	658

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the other assistant clerks, of whom there were four appointed under the act of 1888, were abolished on the 31st of January, 1898.

*Seemle*, that no action of the board of estimate and apportionment of the city of New York could affect the right of such assistant clerk, if entitled to the office, to his compensation.

GOODRICH, P. J., dissented.

APPEAL by the defendant, The City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 21st day of July, 1898, upon the decision of the court rendered after a trial at the Kings County Trial Term before the court without a jury.

*R. Percy Chittenden*, for the appellant.

*Albert A. Wray*, for the respondent.

CULLEN, J.:

The plaintiff sues for his salary as assistant clerk in the court of the justice of the peace of the first district of the city of Brooklyn for the months of January and February, 1898. By section 14, title 21 of the charter of the city of Brooklyn (Chap. 583, Laws of 1888), a justice of the peace was empowered to appoint a clerk of his court, and such other clerks or assistants as the common council might authorize, all to serve during the pleasure of the justice. Under authority of the common council of that city the plaintiff was, on January 1, 1896, appointed by Jacob Neu, a justice of the peace, assistant clerk of his court, at a salary of \$1,000 a year, and remained as such until the consolidation of the city with the city of New York. He contends that by the provisions of the Greater New York charter (Laws of 1897, chap. 378) he has been continued in office and is entitled to his salary. The defendant answered, admitting the allegations of the complaint, and setting up as a separate defense that the plaintiff was retained in office by the justice in violation of section 1542 of the charter, which provides that it shall be the duty of all heads of departments of the city and officers charged with the duty of expending or incurring obligations to regulate their expenditures so that the same shall not in any one year exceed the appropriation for that purpose made by the board of estimate and apportionment.

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Without question the plaintiff, under the terms of section 1384, was continued in office until the end of January. Whether he was continued beyond that time depends on the construction of section 1373. By this section it is provided that the justice elected or appointed for each district shall appoint a clerk and an assistant clerk, who shall receive in the boroughs of Manhattan, Brooklyn and the Bronx an annual salary of \$3,000. Then follows: "The clerks, assistant clerks, stenographers, interpreters and attendants of the District Courts in the city of New York, and of the Justices' Courts of first, second and third districts of the city of Brooklyn, who shall be in office on the first day of January, eighteen hundred and ninety-eight, shall continue until the expiration of their respective terms, in the like capacities as officers of the said Municipal Court." The section then authorizes a justice to appoint attendants to the court not exceeding three, a stenographer, and in each district of the borough of Manhattan an interpreter. The salary and terms of these latter officers are prescribed, and the justice is authorized to remove any of them after notice and hearing. It is contended for the defendant that as the plaintiff held his office during the pleasure of the justice, he had no official term, and that his case, therefore, does not fall within the provisions of the section. The case of *People ex rel. Batey v. Tierney* (31 App. Div. 309) is cited in support of this claim. It was there said, in reference to this section, by Mr. Justice CHASE in an opinion adopted by the Appellate Division: "This provision does not include the relator. The word 'term,' when used with reference to the tenure of office, ordinarily refers to a fixed, definite time, and does not apply to appointive offices held at the pleasure of the appointing power." This declaration was unnecessary to the decision of the case, and we are not prepared to express an opinion upon the question; nor is it necessary to decide it in the present case. If the plaintiff was entitled by law to hold his office and receive its compensation, we do not believe that any action by the board of estimate and apportionment could affect his right. But in our view it was not the intention of the section cited to continue in office all officers of the Justices' Courts in the particular districts named. It will be observed that the section provides a permanent plan for the administration of the Municipal Court. The exact number of clerks to be provided for a court is prescribed;

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a clerk and an assistant clerk, as are also their salaries. Then is found the direction for the continuance in office of certain old officers, and then provision for the appointment of a definite number of attendants, stenographers, and, in certain cases, interpreters. While the direction for the continuance in office in certain cases is interjected in the body of the section, instead of being found at its end, still, we think, it is to be construed in connection with the provisions made for appointments to such courts. When it is declared that "the clerks, assistant clerks," etc., shall be continued in office, there is meant the clerks, assistant clerks, etc., authorized by the section, to wit, one clerk, one assistant clerk, and no more than three court attendants. The Legislature evidently determined that this official force was sufficient for the administration of any of the courts. No greater force of clerks or attendants would be requisite for the present than for the future. All these officers, in the case of Justices' Courts of the city of Brooklyn, held their offices only during the pleasure of the appointing power. Being liable thus to have their official terms terminated at any time, they had no particular equity to be continued in office after the Legislature had concluded that their offices were unnecessary. At the time of the consolidation there appear to have been in Justice Neu's court, besides the clerk, four assistant clerks, with different salaries. In our view of the construction of the statute only one assistant was to be continued in office. The justice could designate that assistant, but the offices of the others than the one so designated were abolished on the 31st of January, 1898. (§§ 1350, 1384.)

The judgment appealed from should be modified by reducing the recovery to the sum of eighty-three dollars and thirty-three cents, and, as modified, affirmed, without costs of this appeal to either party.

All concurred, except GOODRICH, P. J., who read for affirmance.

GOODRICH, P. J. (dissenting):

I am not able to agree with Mr. Justice CULLEN that the clause of section 1373, which relates to the continuance in office of the clerks and assistant clerks of the Justices' Courts in Brooklyn who were in office on January 1, 1898, does not cover the office of the plaintiff.

There are three clauses of the section which are to be considered. They read as follows, the division being my own :

*First.* "There shall be in and for each district a clerk of said court, and in each district in the boroughs of Manhattan, Brooklyn and of The Bronx, an assistant clerk, who shall be appointed by the justice elected or appointed from said district, as hereinbefore provided, and shall hold office for the term of six years from the date of appointment."

*Second.* "The clerks, assistant clerks, stenographers, interpreters and attendants of the District Courts in the city of New York and of the Justices' Courts of first, second and third districts of the city of Brooklyn, who shall be in office on the first day of January, eighteen hundred and ninety-eight, shall continue until the expiration of their respective terms in the like capacities as officers of the said Municipal Court."

*Third.* "The said justices shall in like manner, on or before the thirtieth day of January, eighteen hundred and ninety-eight, also appoint the officers necessary to attend the court in each district, not exceeding three, at an annual salary of one thousand dollars, and a stenographer in and for each district at an annual salary of two thousand dollars, and in and for each district in the borough of Manhattan an interpreter at an annual salary of twelve hundred dollars. Each of said attendants, stenographers and interpreters shall be appointed for two years or to fill the residue of an unexpired term. The said justices may remove any of said attendants, stenographers or interpreters, provided that before removal such officers shall have notice of the cause of their proposed removal and an opportunity to make an explanation; and the reasons for any removal shall be briefly entered on such minutes."

The section, as Mr. Justice CULLEN has said, "provides a permanent plan for the administration of the Municipal Court." The 1st clause provides generally for the appointment of clerks and assistant clerks, and the 3d clause for the appointment and removal of other attendants. I think that the 1st clause relates both to those clerks and assistant clerks who were in office on January 31, 1898, and their successors, and to those who should be appointed by the seven newly-appointed justices for their respective districts. All new appointees are to hold office for a term of six years, and they

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are required to file bonds and not to engage in any other business. The section defines them as clerks and assistant clerks *of the Municipal Court*, and it was intended that they should ultimately constitute the working clerical force of the court. But as there were already clerks, assistant clerks and other attendants in office, appointed by the former justices, the Legislature, by the 2d clause, evidently intended not to interfere with such incumbents, but to retain them in office until the expiration of their terms, when their successors are to be appointed as provided in the 1st clause. They are spoken of in the 2d clause, not as clerks and assistant clerks of the Municipal Court, but as clerks and assistant clerks *of the District Courts of the first, second and third districts of the city of Brooklyn*, who shall be in office on the 1st day of January, 1898, and declares that they shall continue until the expiration of their respective terms, in the like capacities as officers of the Municipal Court. Here is a distinct definition and differentiation of the two classes of officers, the first consisting of those persons who are to be appointed as clerks and assistant clerks of the Municipal Court, and the second consisting of those persons who were clerks and attendants of the old District Courts already in office. The latter were to be transferred into the Municipal Court and retain their offices until the expiration of their terms.

I think it is evident that the Legislature intended by the 1st clause to provide for the appointment of the clerks and assistant clerks in each district by the justice elected or appointed, whenever there was a vacancy; and by the 2d clause, in distinction from the 1st, to recognize and continue in office the existing incumbents of such positions as were already filled. There is no conflict or inconsistency between the two clauses.

Again, I think the learned justice misconstrues the section when he says that it "authorizes *a justice* to appoint attendants to the court, not exceeding three, a stenographer, and in each district of the borough of Manhattan, an interpreter." This is required to be done by all the justices, not by the individual justice in each district. In the first-quoted clause of the section, relating to the appointment of clerks or assistant clerks, the words used are, "the justice elected or appointed from said district," and in a clause not quoted, "each justice;" but in the third-quoted clause, relating to

the appointment and removal of attendants, stenographers and interpreters, the words used are "The said justices" shall appoint and remove. I think this requires the action of all or a majority of the justices, either in their separate capacities or in the board created by section 1374, which provides that "the justices of said court shall constitute the board of justices of the Municipal Court and discharge the functions thereof."

Some light may be thrown upon the question by reference to other provisions of the charter. So careful was the Legislature not to disturb existing tenures of office that there is a general provision in section 1536 that "All the clerical and other subordinate forces, \* \* \* not subject to removal without cause, in the public employ," shall continue in office unless their positions are vacated by the other provisions of the charter, and even then it is declared that the clerks and subordinates of departments that are reconstructed under the same or other names shall continue in office. I do not mean to intimate that the word "department," as used in the charter, includes the Municipal Court, but I refer to those provisions as indicating by analogy that it was the intention of the act not to disturb existing tenures of office. It is certain that the words "clerical forces in the public employ" do include the plaintiff.

Mr. Justice CULLEN expresses no opinion as to the time the plaintiff's term of office expires, but I think the question has an important bearing upon the subject. The plaintiff was appointed under section 14 of title 21 of chapter 583 of the Laws of 1888, which gave the justices power "to appoint a clerk of their respective courts; also to appoint such other clerks, assistants, stenographers as the common council may authorize. All such appointees to serve during the pleasure of said justices," and I assume that authority for the appointment of the plaintiff was given by the common council.

What then is the pleasure of the appointing justice? Not discussing the question whether he could irrevocably appoint the plaintiff for the definite term of his own office and thus defeat the exercise of his pleasure if occasion for removal should arise, he appointed the plaintiff to office for some period. He has continued to permit him to hold office. The plaintiff was in office on January 31, 1898. The justice has, by the pay roll contained in the record, certified to the comptroller of the city that the plaintiff, for the months of

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January and February, was actually in office as assistant clerk at the salary of \$1,000 per annum. Evidently, so far as the pleasure of the justice can continue the plaintiff in office, he still remains undisturbed, and I do not see how he can be declared out of office until he has been removed by the justices under the provisions of the section in question.

I think the judgment as appealed from should be affirmed.

Judgment modified, without costs, in accordance with opinion of CULLEN, J.

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ANDREW WISSEL, Respondent, v. GEORGE OTT, Appellant.

*Ejectment — waiver by a tenant at will of his right to the statutory notice to quit — chapter 531 of the Laws of 1895 — assumption by the court that the plaintiff's father died subsequent to its passage.*

A tenant at will, entitled to the statutory notice of thirty days to quit, waives that right where, in an action of ejectment against him, his counsel, a question having arisen as to the legitimacy of the plaintiff, states that the defendant disclaims any right to the premises if the plaintiff was the heir of his father.

Chapter 531 of the Laws of 1895, by which a child born out of wedlock is made legitimate by the subsequent marriage of its parents, is not operative to divest any title acquired prior to its enactment, but where, on an appeal by a defendant from a judgment in favor of a plaintiff coming within the provisions of that act, the record is silent on the question as to whether the plaintiff's father died prior to or after the enactment of that statute, the court will assume that the death occurred subsequent to it and sustain the plaintiff's right as heir.

APPEAL by the defendant, George Ott, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 2d day of May, 1898, upon the decision of the court rendered after a trial at the Kings County Trial Term before the court without a jury.

*Stephen B. Jacobs*, for the appellant.

*Thomas P. Mulligan*, for the respondent.

CULLEN, J.:

This action is in ejectment to recover premises of which the plaintiff's father died seized. We are inclined to think that the



defendant was a tenant at will, entitled to the statutory thirty days' notice to quit, and that the refusal of the trial court to dismiss the complaint, made at the close of the plaintiff's case, was erroneous. (*Larned v. Hudson*, 60 N. Y. 102.) But the appellant is precluded from raising this objection by his subsequent action on the trial. The plaintiff had put in evidence, as part of his case, a decree of the surrogate made in proceedings for the probate of heirship establishing his right to inherit the premises as sole heir of his deceased father. The defendant proved, by a witness, that the plaintiff's parents were married in this country two years after the birth of the plaintiff in Germany. The defendant thereupon moved for judgment on the ground that the illegitimacy of the plaintiff precluded his inheritance. The record shows that the counsel for the defendant then stated that the defendant disclaimed any right to the premises if the plaintiff was the heir. This disclaimer disposed of any right the defendant might have had to continue his occupation till after thirty days' written notice to quit.

This action was begun on the 27th of July, 1897. There is nothing in the case to show when the plaintiff's father died. By chapter 531 of the Laws of 1895, the plaintiff, if born out of wedlock, was legitimatized by the subsequent marriage of his parents. Of course this statute could not divest any title that had accrued prior to its enactment. As the record is silent on this subject, we must assume that the death of the plaintiff's father was subsequent to the statute. Further, apart from the statute, the testimony of the witness for the defendant and the decree of the Surrogate's Court raised a question of fact, on which question the decision of the trial court is controlling.

The judgment appealed from should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

JOSEPH F. SINNOTT, as Surviving Partner of MOORE & SINNOTT, Judgment Creditor, Respondent, v. FIRST NATIONAL BANK of Hempstead, Third Party, Indebted to HENRY SAMMIS, Judgment Debtor, Appellant.

*Supplementary proceedings—order for the examination of a third party—the judgment debtor may require it to be filed, although it criminales the party obtaining it.*

In proceedings supplementary to execution, instituted by a judgment creditor to require a third party indebted to the judgment debtor to submit to an examination, the debtor has an interest by virtue of which he may compel the judgment creditor's attorney to file an order which he has procured for such examination, although, the judgment having been paid, the judgment creditor has obtained an order discontinuing the proceeding against the third person. The fact that the order or the affidavit on which it was granted may tend to criminate the person who obtained it is not a justification for his failure to file the papers.

APPEAL by Henry Sammis, the judgment debtor in the above-entitled action, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Queens on the 20th day of October, 1898, denying his motion to compel the plaintiff and his attorneys to file an order which the plaintiff had procured for the examination in supplementary proceedings of the First National Bank of Hempstead, a third party, indebted to the said Henry Sammis.

*Pierre M. Brown*, for the appellant.

*Philo P. Safford* [*William S. Beers* with him on the brief], for the respondent.

CULLEN, J.:

The plaintiff recovered a judgment against one Henry Sammis for a sum of money. He issued an execution to the sheriff of Queens county. Subsequently he instituted supplementary proceedings against the First National Bank of Hempstead, as a third party, indebted to the judgment debtor. Prior to the time of the commencement of these proceedings, the judgment debtor had paid the sheriff the amount due on the judgment, though of this fact the plaintiff's attorney was ignorant. On discovering that the judgment

was paid, he obtained an order discontinuing the proceeding. The judgment debtor moved that the plaintiff's attorney be directed to file the order for the examination obtained by him in the office of the clerk of the county of Queens. From an order denying such motion this appeal is taken.

While the constitutionality of the institution of supplementary proceedings against a third party, without notice to the judgment debtor, has been upheld (*Gibson v. Haggerty*, 37 N. Y. 555), still the interest of the judgment debtor in a proceeding which takes his property and his right to intervene therein is too plain to admit of doubt. In fact, in the very case cited, the doctrine is asserted that notice should always be given to the judgment debtor when practicable. The right of the judgment debtor to move in the proceedings is, therefore, clear. (*Matter of Gagnon*, 32 App. Div. 22.)

Supplementary proceedings are made special proceedings by the Code of Civil Procedure. (§ 2433.) By section 825 of the Code, it is provided that a return or other paper in a special proceeding must be filed, and an order thereon entered with the clerk of the county in which the special proceeding is taken, if taken before a county officer, or with the clerk of the county designated by a justice of the Supreme Court, if the proceedings are before such a justice. I do not know that the intention of the section is to render compulsory the filing of all papers in special proceedings, for there seems to be no provision of law equally general as to the filing of papers in an action. It may be that the section was intended only to provide a place where papers, the filing of which was requisite or proper, should be filed. Still, even assuming that the more restricted construction of the section is to be adopted, we are of opinion that the order for the examination of the third party should, on the application of the judgment debtor, have been filed. By section 824 of the Code, the summons and pleadings in an action must be filed. The affidavit and order for the examination of a third party operates as the commencement of the special proceeding, and bears to it a relation strictly similar to that borne by a summons and complaint to an ordinary action. The same rule should apply to both, and as one is in express terms required to be filed, the other should be so required also. It has been expressly held that where an examination has been had under such an order, the order

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and examination must be filed with the county clerk. (*Fiske v. Twigg*, 5 Civ. Proc. Rep. 41; *Renner v. Meyer*, 22 Abb. N. C. 438.) In *Savage v. Relyea* (3 How. Pr. 276) it was held the duty of the respective attorneys to file the papers used by them on a motion, even when made before a justice out of court. By rule 2 of the General Rules of Practice it is directed that where no provision is made by the Code, papers in the Supreme Court shall be filed in the office of the clerk of the county specified in the complaint as the place of trial. Section 1304 of the Code of Civil Procedure authorizes the court, when an appeal is taken from an order made by a judge out of court, to compel the filing of the papers upon which the order is founded, and speaks of the failure so to do as an omission. While it is true that there are many papers in an action, and a certain class of orders, such as orders to show cause, that are usually not filed, still we think it is the right of any party to a litigation to have orders or affidavits which have been the subject of action against his person or property filed in the records of the court, so that if he has been aggrieved thereby he may take the proper remedy, and the proof of his grievance be preserved. The fact that the order or the affidavit on which it was granted may tend to criminate the party who obtained it, is not sufficient reason for his refusal to file the papers. (*Anonymous*, 5 Cow. 13.)

The order appealed from should be reversed and motion granted, with ten dollars costs and disbursements to appellant.

All concurred.

WILLARD BARTLETT, J. :

I concur; but I think that section 825 of the Code is mandatory to the effect that all papers in special proceedings shall be filed.

Order reversed, with ten dollars costs and disbursements, and motion granted.

THE FULTON GRAIN AND MILLING COMPANY, LIMITED, Respondent,  
v. JOHN ANGLIM, Appellant.

*Contract of sale — violation of an agreement that the vendee was to sell the merchandise to a third party — a guarantor is not thereby discharged — application of payments — proof required of the surety.*

A surety, who has guaranteed the payment for oats sold under an agreement by the vendee that they were for the use of, and to be sold only to, the Brooklyn fire department, and that all moneys received from such department were to be applied in payment thereof, is not relieved from his obligation because the vendee diverted a part of the oats to other purposes and did not deliver them to the fire department as provided for in the contract of sale.

Where it appears that the vendee made other purchases from and had another account with the vendor, and that he, during the same period, also furnished other goods to the fire department, the burden rests on the surety to show that drafts of that department, which the vendee either directly or indirectly received, were given by it on account of goods sold under the particular contract, for the performance of which he was surety.

APPEAL by the defendant, John Anglim, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 26th day of April, 1898, upon the verdict of a jury rendered by direction of the court, and also from an order entered in said clerk's office on the 29th day of April, 1898, denying the defendant's motion for a new trial made upon the minutes.

*George W. Sickels*, for the appellant.

*Paul Eugene Jones*, for the respondent.

CULLEN, J.:

This action is brought upon a guaranty of payment, executed by the defendant to the plaintiff, upon an executory agreement for the sale by the plaintiff to the firm of Anglim Brothers of 25,000 bushels of oats. The agreement provided that the oats were for the use of and to be sold only to the Brooklyn fire department. Anglim Brothers agreed to pay for the oats monthly, as delivered, and to apply all moneys received from the Brooklyn fire department to such payment, and that at any time, on demand, they would execute to the plaintiff assignments for any claim they might have

against the fire department for the oats so sold. Two defenses were pleaded: *First*, that a part of the oats were not furnished to the Brooklyn fire department; *second*, that the plaintiff had been paid in full from drafts of the fire department in favor of Anglim Brothers. At the conclusion of the evidence the court directed a verdict for the plaintiff.

While Anglim Brothers agreed that the oats sold under this contract should be sold only to the Brooklyn fire department, this did not create any duty on the part of the plaintiff to see that the oats were so used by that firm. The contract contemplated a delivery to the firm, and at such time the title to the oats would pass to the firm and the property be beyond the control of the plaintiff. If Anglim Brothers diverted the oats to other purposes than that provided for in the agreement, it was a breach of the contract on their part which neither relieved them nor the defendant from liability.

As to the defense of payment, it appears that Anglim Brothers turned over to the plaintiff a number of drafts of the fire department in favor of the firm, which, in amount, exceeded the debt due from that firm to the plaintiff. But it also appears that, during the running of the contract in suit, Anglim Brothers made other purchases from and had another account with the plaintiff, and also, during the same period, the firm furnished other goods to the fire department. It is clear that the plaintiff and the firm of Anglim Brothers could not appropriate any moneys received from the fire department, and which, under the contract, were properly applicable to the payment of this claim, to other accounts and thus prejudice the defendant. (*Orleans County Nat. Bank v. Moore*, 112 N. Y. 543; *Farrington v. Frankfort Bank*, 31 Barb. 183; *Bridenbecker v. Lowell*, 32 id. 9.) But as we construe the contract between the parties, the only payments by the fire department which were to be appropriated to this debt were payments on account of the goods sold under the contract, not payments on account of other goods sold the department by Anglim Brothers. The burden rested on the defendant to show that the drafts of the fire department which the plaintiff either directly or indirectly received were on account of the goods sold under the contract. The draft of \$1,444.40 was to the extent of only \$547.58 for oats sold the department. In no event, therefore, was the defendant entitled to credit for more than

this sum, but even as to this amount it does not clearly appear that these oats were part of the contract lot. However, it is unnecessary to discuss this question further, as the judgment must be reversed for error regarding another item. The case seems to have been tried hurriedly, and the facts as to this draft or the goods for which it was paid may more clearly appear on another trial.

For the defendant a former bookkeeper of the firm of Anglim Brothers testified to a payment by check of the sum of \$1,000 on account of this contract, for which Anglim Brothers were not credited. In answer to this one of the firm and the plaintiff's agent testified that the payment was not made on account of this claim, but on account of another claim against the firm. The testimony as to the details of this payment is extremely meagre. It was made by the check of the firm, but there is not a word in the evidence as to who delivered the check on the part of the firm, or as to what was the conversation or transaction at the time of the delivery. The testimony is simply a bald statement on the part of one witness that the payment was made on the account in suit, and by two other witnesses that it was made on another account. It is urged by the respondent that the bookkeeper took no personal part in the transaction, and that his evidence is either hearsay or merely a conclusion. But nothing of the kind appears in this meagre record, and no objection was made to the bookkeeper's testimony. As the record stands before us, there was a plain dispute of fact as to this payment, which should have been submitted to the jury for determination. . .

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide the event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. LOUIS BECK,  
Respondent, v. BIRD S. COLER, Comptroller of the City of New  
York, and WALTER H. HOLT, Auditor of Accounts Detailed to  
the Borough Hall in the Borough of Richmond, Appellants.

*Mandamus*—issued to compel a ministerial officer to pay where the right is clear,  
although there exists a remedy at law—*prima facie* case—what averments in an  
answer are insufficient—supervisory power of the comptroller of New York.

The rule that a mandamus will not be granted where the party has a remedy by  
action is one addressed to the sound discretion of the court and is not of uni-  
versal application; and where the right of a party to payment is clear and  
there are funds on hand applicable to such payment, the court may and will,  
in the exercise of a sound discretion, compel by mandamus a ministerial  
municipal officer to audit and pay the claim, although, if the city itself repu-  
diated or denied the existence of the obligation, the rule would be different.

Where, on an application by a contractor for a mandamus to compel the pay-  
ment of an amount due him under a contract for the erection of a schoolhouse  
within the limits of Greater New York, it appears that money for the con-  
struction of the schoolhouse was raised by the issue of bonds of the school  
district, and that the proceeds were paid to the comptroller before the time of  
the application, the relator has made out a *prima facie* case.

While the rule is strict that all facts averred in answer to an application for a  
peremptory writ, whether of an affirmative character or merely denials, must  
be taken as true, the rule is equally strict that affirmations which are only con-  
clusions of law or fact, or are indefinite or general statements, are of no avail  
and worthless; and a denial in gross, without stating facts, is a mere conclusion.

The comptroller of the city of New York, in the absence of fraud or illegality,  
has no general supervision over the conduct of other officers or departments of  
the city.

APPEAL by the defendants, Bird S. Coler, comptroller of the  
city of New York, and another, from an order of the Supreme  
Court, made at the Kings County Special Term and entered in the  
office of the clerk of the county of Richmond on the 1st day of  
June, 1898, granting the plaintiff's motion for a peremptory writ of  
mandamus directed to the defendants, commanding them to examine  
the relator's claim and to audit and allow on said claim eighty-five  
per cent of the value of the work performed and materials furnished  
by the relator, not exceeding the sum of \$750, as certified to the  
said defendants by the engineer and architect.

34	167
144	240
34	167
48	494
34	167
68	474
34	167
56	103
56	110
56	461
56	463
34	167
58	133
34	167
61	225

84	167
77	510



*Almet F. Jenks* [*R. Percy Chittenden* with him on the brief],  
for the appellants.

*George J. Greenfield*, for the respondent.

CULLEN, J. :

On December 10, 1897, at a meeting of the inhabitants of school district No. 1 of the towns of Castleton and Middletown, Richmond county, a resolution was passed authorizing the trustees of the school district to purchase a new site and build a new schoolhouse thereon, and for that purpose to raise the sum of \$80,000 by tax upon the district. Thereafter the trustees of the school district entered into a contract with the relator for the construction of the school building for the sum of \$79,500, payments to be made as the work progressed, on the certificate of the engineer and the architect in charge of the construction of the building. The relator commenced the prosecution of the work, and in February, 1898, received a certificate from the engineer and the architect that he was entitled to a payment of at least the sum of \$750. This certificate was presented to the comptroller for payment, and to the auditor of the borough for audit. The comptroller refused payment, and the auditor declined to act on the claim. Thereupon the relator applied to the Special Term for a writ of mandamus to the auditor and comptroller to ascertain and certify the value of the work performed and materials furnished by the relator under his contract, and to audit and allow such value as ascertained, not exceeding the amount certified by the engineer and the architect. From an order granting the writ of mandamus as prayed for, this appeal is taken.

The first claim of the appellants is that the relator's remedy is by action and not by mandamus. The rule that a mandamus will not be granted where the party has a remedy by action is one addressed to the sound discretion of the court, and is not of universal application. Thus in *Matter of Freel* (148 N. Y. 165) the comptroller of the city of Brooklyn was required by a writ of peremptory mandamus to approve the relator's claim for work and material furnished under a contract with the city for the construction of a reservoir, and to make and sign a warrant for its payment. There was no question in that case but that the relator might have sued the city for the claim in an action at law. In *People ex rel. Kings*

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*Co. Gas Co. v. Schieren* (89 Hun, 220) a writ of mandamus was issued against the comptroller and auditor to examine the relator's claim for gas furnished under a contract with the city, and to certify the value thereof. Undoubtedly, also, in this case an action on the claim would lie. We are of opinion that, where the right of a party to payment from the city is clear, and there are funds on hand applicable to such payment, the court may and will, in the exercise of a sound discretion, compel by mandamus a ministerial officer to audit and pay the claim; though if the city itself repudiated or denied the existence of the obligation, the rule would be different. In the present case money for the construction of the schoolhouse was raised by the issue of bonds of the school district, and the proceeds were paid to the comptroller before the time of the relator's application. The relator, therefore, made out a *prima facie* case and was entitled to the writ, unless the affidavits on behalf of the comptroller and auditor showed sufficient cause to the contrary.

The affidavit of Mr. Coler states that he has examined the minutes of the meeting of the board of school trustees, and that from those minutes it appears that \$5,500 was paid for the new site, a plot of about two acres, while the assessed value of the land was only \$250 an acre; that a resolution was passed that the new schoolhouse should be built on the old site, and that the resolution authorizing the expenditure for the new schoolhouse was void, because it was passed by the votes of persons who were not qualified by law to vote on the question; that the plans of the schoolhouse are unnecessarily elaborate and ornate, and not adapted to practical purposes, and that the sum bid for the work is excessive. The rule undoubtedly is that when a party moves for a peremptory mandamus in the first instance, all allegations of fact in the opposing papers sufficiently made must be assumed as true. But in this case, by the stipulation of the parties, a certified copy of the minutes of the meetings of the school district was presented to the Special Term, and is before us on this appeal. The affiant Coler had no personal knowledge of the action of the meetings of the voters of the school district, or of the trustees, but his statements are based solely on an inspection of the records of those meetings. Therefore, where the records are in conflict with the affidavit, the former

must be accepted as true, and the latter considered insufficient to raise any issue of fact. The record shows that the resolution to build the new schoolhouse on the old site was not carried, but lost. The allegation in the affidavit of the comptroller that the resolution to erect a new schoolhouse was passed by the votes of persons not qualified is a mere statement of a conclusion of law and insufficient. The record of the meetings of the voters of the school district gives the name of every person voting for or against the resolution, and shows that the resolution was carried by a majority vote. The affidavits in opposition to the relator's application do not name a single voter who it is claimed was not qualified to vote, nor do they state for what reasons any voter was so disqualified. For aught that appears in these affidavits, there may be no dispute whatever as to the facts relative to the qualification of these voters, and the statement in the affidavit that voters were disqualified may be based solely on the affiant's interpretation of the law on the subject; an interpretation which it is impossible for the court to say was either correct or erroneous, as it is not stated what that interpretation was. While the rule is strict that all facts averred in answer to an application for a peremptory writ, whether of an affirmative character or merely denials, must be taken as true, the rule is equally strict that "Affirmations which are only conclusions of law or fact, or are indefinite or general statements, are of no avail and worthless," and "A denial in gross without stating facts is a mere conclusion." (*Matter of Freel*, 73 N. Y. St. Repr. 331; *Matter of Guess*, 16 Misc. Rep. 306.) Nor are the allegations of the extravagance of the proposed improvement and its lack of utility, sufficient to defeat the relator's claim. No allegation whatever of fraud is made. It may be that the site selected for the new schoolhouse is ill chosen and that the plans for the building are ill advised; but those were matters for the voters of the school district to pass upon, and their action, taken in good faith and under authority of law, is not subject to review by the comptroller of the city. The opposing affidavits, therefore, stated no fact sufficient to defeat the relator's claim, and his right was clear.

The case is to be distinguished from that of *People ex rel. Paving Co. v. Mooney* (4 App. Div. 557). There it was sought by writ of mandamus to compel the board of public works of the

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city of Buffalo to execute a contract which had been awarded the relator, as the lowest bidder, for paving a street in that city. It appeared in opposition to the application that since the adoption of the resolution to pave the street, it had been determined to convert the street into a boulevard and a part of the park system of the city. The application was denied and the relator left to his remedy by action, on the ground that the board of public works was justified in refusing to prosecute an improvement which was shortly afterward to be rendered valueless. We assume that a municipal corporation, the same as an individual, may at any stage decline to prosecute an improvement for the carrying out of which it has contracted; remaining, of course, liable to the contractor for damages for breach of the contract. But in this case the city has taken no such action. The respondents in the Buffalo case constituted that department of the city government which had, subject to the common council, control and management of the public work the prosecution of which it was sought to compel. It may be that in the present case the board of education or the school board of the borough might suspend or terminate the construction of the new schoolhouse; but in the absence of fraud or illegality the comptroller has no general supervision over the conduct of other officers or departments of the city. If the further prosecution of a public work is unwise and should be abandoned, it is for the proper department, not the comptroller, to determine that question. The construction of the new schoolhouse was entered upon, and the contract with the relator for its construction made, in pursuance of law. Until the proper city authorities have determined to abandon the work, the comptroller must properly discharge the duties relating thereto, imposed upon him by law.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

CHARLES H. SHANLEY, Appellant, v. CATHERINE F. SHANLEY,  
Respondent.

*Will — testimony as to statements of the decedent in avoidance of its legal effect — election by a life tenant as to conveying her own land devised by the will — effect of non-compliance with the will.*

Where a testator, after giving to his widow, in lieu of dower, a life estate in three lots, devises the estate in remainder in one of the lots (the title to which stands in the name of his wife) to his son, by a provision concluding with the words, "which said strip or parcel it is understood my said wife will convey and transfer to my said son," it is not proper to avoid the effect of the will by allowing one of the subscribing witnesses to it and the counsel who drew the instrument to testify that, at the time of its execution, it was agreed by the testator and his wife that the direction of the will to convey to the son should be discretionary and not obligatory.

The fact that the widow takes possession of the land devised to her for life, and of certain personal property specifically bequeathed to her, while she refuses to convey the lot, the title to which stands in her name, does not constitute an election on her part, as in so doing she as much disclaimed the will as adopted it — the case being distinguishable in principle from one in which a widow accepts provisions of a will in lieu of dower, or one in which a person accepts a devise, subject to the payment of a legacy, as the widow would not, in a case like the present one, be divested of her land by mere estoppel, affirmative action in a court of equity being necessary to compel her to part with her title to it.

*Seemle*, that where a beneficiary refuses to comply with the demands of a will, and thus renders its provisions in his favor liable to forfeiture, the forfeiture is not total, but that only so much of the gift is forfeited as is necessary to make compensation to the person, the provisions of the will in favor of whom the beneficiary has declined to carry out.

APPEAL by the plaintiff, Charles H. Shanley, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Westchester on the 25th day of July, 1898, upon the decision of the court rendered after a trial at the Westchester Special Term dismissing the plaintiff's complaint.

The will of Michael C. Shanley, after giving to his widow in lieu of dower a life estate in three lots, devised the lots, one to each of two daughters, and the third, the title to which stood in the name of his wife, to his son, who is the plaintiff here, by a provision concluding with the words "which said strip or parcel it is understood my said wife will convey and transfer to my said son." At the death of the testator the widow entered into the possession of her life

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estate, including the lot given to the son. The plaintiff brought this action to compel a conveyance to him of the lot in question under an alleged agreement made by the widow of the testator at the time the will was executed, and the widow having died pending the suit, the present defendant, to whom the widow had devised the lot, was substituted as defendant in her stead.

*Gilbert O. Hulse*, for the appellant.

*Maurice Dillon* [*John H. Clapp* with him on the brief], for the respondent.

CULLEN, J. :

This case has been before us on a previous appeal, and the facts showing the nature of the controversy are sufficiently recited in the opinion then delivered by Mr. Justice GOODRICH. (*Shanley v. Shanley*, 22 App. Div. 375.) On the present trial no evidence was given tending to show that the land, the title to which stood in the name of the testator's widow, was in reality his and under his control, nor of any parol agreement between the testator and his wife by which the latter agreed to convey the land to the plaintiff. Still, as we held on the first appeal, the will itself put the testator's widow, through whom the defendant claims title, to an election whether she would accept the provisions of the will made in her favor and convey her own property to the plaintiff, or exercise her unquestionable right to keep her own. To avoid the effect of the will, one of the subscribing witnesses to it, and the counsel who drew the instrument, was allowed to testify, over the objection and exception of the plaintiff, that at the time of the execution of the will it was agreed between the testator and his wife that the direction of the will to convey to the plaintiff should be discretionary and not obligatory. We think this was plainly erroneous. Parol evidence was as incompetent to vary the effect of this provision of the will as it would have been to modify or alter any other provision. No distinction in principle can be drawn between the two cases; and the question is also settled by authority. (1 Jarm. Wills [6th ed.], \*424; Bisp. Eq. [5th ed.] 415.) The decision of the learned court proceeded chiefly on this agreement between the testator and his wife. The judgment must, therefore, be reversed, unless it clearly appears that the plaintiff's right to relief was barred on other grounds.

There was evidence tending to show that the widow received no part of the testator's personal estate except his household furniture, and even contributed her own funds to pay the testator's debts, to discharge the mortgages on the property, and to make some payments to her children as directed in the will. At least \$4,200 of the insurance money accruing on the testator's decease was payable to the widow personally. All this was turned over to the husband's estate, and the only benefit she seems to have derived from the personal estate was the payment of a \$2,000 mortgage on her own property. There is no proof in the case as to the value of the household furniture bequeathed to the widow absolutely, or of the rental value of the real estate devised to the widow for life. It may be that, as stated by the learned counsel for the respondent, these were of little value, but we cannot indulge in such a presumption; and if in fact the widow gained nothing by her husband's will, it was incumbent upon the defendant to show it.

Here, however, it is necessary to examine the claim of the plaintiff that the testator's widow made her election when she entered into the possession of the real estate and personal property specifically bequeathed, and that having then made her election she was bound by it, and was obliged to convey her land as directed by the will, whether in fact she got any substantial property under the will or not. We do not assent to this claim. Though the widow took possession of the land devised to her for life, she refused to convey away her own land. She just as much disclaimed the will as she adopted it. Under our view of the law, and our construction of the will, she could not consistently assume both positions; nevertheless in fact she did assume both. "The fact of a person not having been called upon to elect and entering into the receipt of the rents and profits of both properties, as it affords no proof of preference, cannot be held an election to take one and reject the other." (1 Jarm. Wills [6th ed.], \*435.) In this respect the case is distinguishable in principle from that of a widow who accepts provisions of a will in lieu of dower, and subsequently discovers that her right of dower would have been more valuable, or one who accepts a devise subject to the payment of a legacy and afterwards finds out that the subject of the devise is not worth the charge on it. The defendant's devisor could not, in a case like the present one, be divested

of her land by mere estoppel. It required affirmative action in a court of equity to compel her to part with her title. (*Beal v. Miller*, 1 Hun, 390.) The plaintiff might at any time have brought his action to compel the widow to make her election. In that action her rights would have been determined, and then, knowing her rights, she could have made her election intelligently. There is this further to be said: Where a beneficiary refuses to comply with the demands of a will, and thus renders the provisions of the will in his favor liable to forfeiture, the rule now is that the forfeiture is not total, but that only so much of the gift is forfeited as is necessary to make compensation to the person the provisions of the will in favor of whom he has declined to carry out. (*Bisp. Eq.* 416.) We do not see why this principle should not equally apply when it is sought to compel a legatee or devisee under a will to specifically carry out its provisions in favor of some third party. We agree with what has been said by the court below in the discussion of this branch of the case, and in our opinion the defendant should have the election to either convey the land to the plaintiff or transfer to him what her grantor received under the will. If in fact she received nothing, then no restitution is to be made.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide the final award of costs.

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LILY KEMP, Plaintiff, v. NEW YORK PRODUCE EXCHANGE,  
Defendant.

34 175  
40 278

*Adopted child — right to inherit a sum payable on the death of a member of the New York Produce Exchange.*

A by-law of the New York Produce Exchange which provides that "Should a member die \* \* \* if he leave children and no widow, then the whole sum shall be paid to the children. \* \* \* Should the member die leaving neither widow nor children, then the whole sum shall be paid to the next of kin of the deceased, within the limit of representation prescribed by the statutes of the State of New York," passed subsequently to the enactment of chapter 830 of



the Laws of 1873, providing that a child adopted thereunder, and the person adopting him, should thenceforth "sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation, except the right of inheritance," creates in favor of an adopted child of a member who died in 1898, leaving no widow or children or remote issue and without next of kin other than such child, a right to the payment of the sum payable on the death of such member.

*It seems*, that the adopted child might claim the fund under the provisions of chapter 703 of the Laws of 1887, as the next of kin, within the Statute of Distributions as modified by that act, although not considered as the child of the deceased member within the meaning of the by-law—the by-law being intended to be construed under the statutes of the State as they existed at the member's death.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

*C. Godfrey Patterson*, for the plaintiff.

*Abel E. Blackmar*, for the defendant

CULLEN, J. :

The defendant, a domestic corporation, was, by chapter 36 of the Laws of 1882 (amending chap. 359 of the Laws of 1862), empowered to assess such of its then present members as might agree thereto, and all members who joined thereafter, a sum to constitute a fund to be paid upon the death of any member to his widow, children, next of kin or other persons dependent upon him, in such manner as the by-laws of the defendant might prescribe. Under this authority the defendant constituted a gratuity fund, raised by assessment on the members assenting to and participating in the scheme. Henry Kemp was at this time a member of the defendant, and became a participant in this plan. The by-laws of the defendant made the following provision for the payment of the fund upon the death of any member :

"Should a member die leaving a widow but no children, then the whole sum shall be paid to such widow for her own use. Should a member die leaving a widow and children, then one-half shall be paid to the widow for her own separate use, and one-half to his children, or if he leave children and no widow, then the whole sum shall be paid to the children for their use, share and share alike.

\* \* \* Should the member die leaving neither widow nor chil-

dren, then the whole sum shall be paid to the next of kin of the deceased, within the limit of representation prescribed by the statutes of the State of New York, and if there be none such, then the same shall be applied in such manner and to such purposes as may be prescribed in the rules of the New York Produce Exchange."

Henry Kemp died on the 16th of May, 1898, leaving no widow, children or more remote issue, and without next of kin, except the plaintiff, who was adopted by him as a child, under the laws of this State. The controversy is whether under the terms of the by-laws the plaintiff, as such adopted child, is entitled to the fund payable on the death of Henry Kemp.

The defendant is right in its contention that the plaintiff cannot claim through Henry Kemp by succession, but directly of the defendant under its by-laws, and that the question is the proper construction of those by-laws. (*Hellenberg v. District Number One, etc.*, 94 N. Y. 580.) It may also be conceded that the plaintiff is not a child of the deceased member in the strict sense of that term, which refers to the physical procreation of the child, and not the legal rights that may have been afterwards conferred upon her by agreement of parties or acts of the Legislature. So it has been said: "Adopted children are not children of the person by whom they have been adopted, and the act of Assembly does not attempt the impossibility of making them such" (*Schafer v. Eneu*, 54 Penn. St. 304), and "Giving an adopted son a right to inherit does not make him a son in fact." (*Commonwealth v. Nancrede*, 32 Penn. St. 389.) But this principle is not decisive of the question involved here. The question is not what is the strict accurate meaning of the word child, but in what sense was it used in the by-laws. Already, at the time of the passage of the act empowering the defendant to create its gratuity fund, and of the enactment of the defendant's by-laws in pursuance of such authority, adoption of children was authorized by the laws of this State. By chapter 830 of the Laws of 1873 it was enacted that a child adopted under the provisions of that act, and the person adopting him, should thenceforth "sustain toward each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation, excepting the right of inheritance." The statute of 1832 authorizes the payment from the gratuity fund to the widow, chil-

dren, next of kin, or other persons dependent on the deceased member. The by-laws state that the object of the gratuity fund is to provide for the families of members. As the law stood at this time, an adopted child was a member of the family of his adopter, and a dependent. Though he was not entitled to inherit from the adopting parent, still such parent could, in a proper case, be compelled to support the child the same as a natural child. It seems to us that, even under the then existing condition of the law, the case of an adopted child fell within the terms of the by-laws, and it was entitled to share in the death fund.

In 1887, however, the statute as to adoption was amended, so as to give the adopted child the right of inheritance. (Laws of 1887, chap. 703.) The effect of this amendment was to modify the Statutes of Distribution and Descent. (*Dodin v. Dodin*, 16 App. Div. 42.) From this time the adopted child had the same rights as a natural child, except as to limitations in deeds or wills conditioned on the death of the adopting parent without issue. The by-laws provide that, in the absence of widow and children, the fund shall be paid to the next of kin of the deceased within the limit of representation prescribed by the statutes of the State of New York. Even if the plaintiff be not considered a child of the deceased member within the meaning of the by-laws, she certainly is entitled to the fund as his only next of kin within the Statute of Distributions. Against this it may be urged that the rights of the parties were fixed by the enactment of the by-laws in 1882, and that it is only persons who would have been next of kin in the State of New York, under the law as it then stood, that are entitled to the fund. We think not. The provision that the sum shall be paid to the next of kin of the deceased, as prescribed by the statutes of the State of New York, is to be construed as meaning the statutes of the State as they may exist at the time of the member's decease. This case is not analogous to that of the rights of a party under a deed of settlement or a will. There, on the death of the testator or the delivery of the deed, the rights of the remaindermen would vest, and those rights could not be divested by subsequent legislation. Though even in such case, if the will or deed showed an intent that the distribution should be governed by the laws that might exist at some future time provided for the distribution of the fund, effect would unquestionably be given to

it. In *Sewall v. Roberts* (115 Mass. 262) the owner of property settled it in trust for the settler during life, and upon his death for the use of his child or children, and in case of his death without issue, then to others. The settler of the trust died without issue, but subsequent to the creation of the trust adopted a child. It was held that the adopted child took the trust estate. It was there said, speaking of the settler of the trust: "His general intention was that the property should go in the first instance to his children as a class. Whoever at his death fell within this class was within this general intention, and as his adopted daughter is by law his child, she belongs to the class intended to take, and her rights cannot be defeated upon the assumption that he did not intend her to take."

The plan or scheme of the defendant's gratuity fund was permanent. It was entered into not only by persons who were members at the time the plan was formulated, but all subsequent members of the exchange became parties to it. It is not to be supposed that the rights of the families of persons subsequently becoming members were to be governed by the law of distribution in case of intestacy as it stood many years before the members joined the exchange. The very permanence of the plan necessarily contemplates that the distribution was to be made according to the law of the State as it might stand at the time the fund became payable. In this view there were no vested rights in this fund to be disturbed by subsequent legislation. The by-laws provide, in express terms, that nothing therein contained shall be construed as constituting any interest which can be mortgaged or pledged for the payment of any debt. Equally it was incapable of assignment. It was the intention to create provision for the family of the deceased member, which should be beyond the hazard of loss from pecuniary misfortune. But a member might have no immediate family, nor any one dependent upon him. As he was compelled to contribute his assessment upon the death of any other member, it was right that he should, though not personally, at least through representation, reap some benefit from the fund on his own demise. It could not be made payable to his estate, for then it would be liable for his debts, the very thing which the plan was devised to avoid. It was, therefore, made payable, in case of the lack of immediate family, to his next of kin, who might be so remote as to have neither legal nor

moral claim upon the deceased for support, though not unnaturally the subject of his bounty upon his death. It seems to us that it would be most unreasonable to construe this by-law as excluding an adopted child while including a remote relative of the blood. It is said that the deceased adopted the plaintiff for the very purpose of enabling her to obtain this fund, and such is the fact. If the mortuary payment was to be made only to persons who might naturally be supposed to be dependent upon the deceased, and in case of the absence of such persons the amount was to be retained by the defendant, it might with some reason be urged that the adoption of the plaintiff by the deceased was a fraud upon the defendant's rights. But as the by-laws provided for payment to the next of kin, however remote, we cannot see how the exchange is interested in the question of whether it should be paid to one rather than to another.

It is possible that the by-laws may be subject to another construction than the one I have placed on them; that is to say, that next of kin more remote than brothers' and sisters' children are not in any event to share in the mortuary payment, because, by the law as it existed in 1882 (Code Civ. Proc. § 2732), no representation among collaterals beyond such relatives was admitted. This construction is not suggested by the counsel, and I think it is not the correct one. The provision of the by-laws as to representation is intended, in my opinion, only to make the distribution of the fund follow the same rule which, under the statutes of this State, governed the distribution of the personal property of the deceased member in case of his intestacy, that there should be no right of representation beyond nephews and nieces, but that in the absence of next of kin within that degree of consanguinity the nearest next of kin, however remote, should take. But if I err in this view, the only result of the error would be to weaken the argument as to the alleged fraud on defendant's rights by the adoption of the plaintiff; it would not affect the discussion of the main proposition.

There should be judgment for the plaintiff on submitted case, with costs.

All concurred.

Judgment for plaintiff on agreed statement of facts, with costs.

THE STATEN ISLAND MIDLAND RAILROAD COMPANY, Respondent, v.  
STATEN ISLAND ELECTRIC RAILROAD COMPANY, Appellant.

*Street railroad — effect of a condition in the consent of a municipality that connecting street railroads shall have a right to use its tracks — power of a board of supervisors — acceptance of a consent subject to such condition.*

A railroad company, accepting a franchise to construct and operate its railroad in a city street, upon the express condition that any other street surface railroad company, operating tracks at least two miles in extent outside the district to which the franchise of such railroad company was limited and connecting with its tracks situated within such district, should have the right to use its tracks and enjoy equal facilities thereto in all respects, cannot deny to another railroad company — operating twenty-eight miles of track outside the district, which has begun proceedings under section 102 of the Railroad Law (Laws of 1890, chap. 565, as amended by chap. 693 of the Laws of 1894) to have commissioners appointed to determine what it should pay to the first mentioned company for the use of the tracks in question, and has secured the payment of whatever compensation should be awarded by giving a bond, approved by the county judge — the right to use its tracks on the ground that the last-mentioned corporation has not obtained the requisite consent from the municipal authorities, or that the conditions attached to the consents procured by the first-mentioned company are not available to the other because void.

*It seems*, that the board of supervisors of a county may grant the right to operate a railroad upon a country road within a village.

In view of the provisions of section 102 of the Railroad Law, to the effect that any street surface railroad company may, under certain circumstances, acquire the right to use the tracks of another street surface railroad company for a distance not exceeding 1,000 feet, which imply that a company, having constructed its own line, can, by granting its consent thereto, authorize the operation of another railroad over the same tracks, a company may, by accepting the consent of a municipality thus conditioned, authorize such use of its tracks in advance.

APPEAL by the defendant, the Staten Island Electric Railroad Company, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Richmond on the 17th day of August, 1898, granting an injunction *pendente lite* restraining the defendant from preventing the plaintiff from connecting its tracks with those of the defendant on South street in the village of New Brighton, and also from preventing the plaintiff from using the tracks of the defendant on such street.

*William N. Dykman* [*Julien T. Davies* with him on the brief],  
for the appellant.

*John S. Davenport*, for the respondent.

WILLARD BARTLETT, J. :

This is an appeal from an order restraining the defendant, during the pendency of the action, from interfering with the plaintiff's exercise of the right of common trackage which it claims over a portion of the defendant's line on South street in the village of New Brighton.

It appears that the franchise of the defendant to construct and operate a railroad in South street was granted by the trustees of the village upon the express condition that any other street surface railroad company operating tracks at least two miles in extent outside the district to which the franchise of the defendant was limited, and connecting with the tracks of the defendant's railroad situated within said district, should have the right to use the defendant's tracks and enjoy equal facilities therein in all respects.

The board of supervisors of Richmond county gave to the defendant a like consent to occupy South street with its railroad, subject to a similar condition.

Each consent contained a provision to the effect that the terms and conditions of such use and the compensation therefor should be fixed in the manner prescribed in section 102 of the Railroad Law or by arbitration, but declared that the right to use such tracks should arise as soon as the company seeking to exercise it should have constructed and have ready for operation two miles of track outside the defendant's district, and should have instituted proceedings under the Railroad Law to fix the compensation, and should have given security to be approved by the county judge of Richmond county for the payment of the compensation aforesaid.

The plaintiff corporation claims a right of common trackage over the defendant's line in South street. It is a street surface railroad company operating twenty-eight miles of track outside the district in which the defendant's line is situated ; it has begun proceedings under section 102 of the Railroad Law to have commissioners appointed to determine what it ought to pay to the defendant for the use of the tracks in question on South street, and it has secured

the payment of whatever compensation may be awarded by giving a bond in the sum of \$5,000, which has been approved by the county judge of Richmond county. The plaintiff has thus brought itself within the terms of the consents given to the defendant by the village trustees and the board of supervisors. Nevertheless, the defendant denies the right of the plaintiff to go over its tracks in South street, insisting (1) that the plaintiff corporation has not obtained the requisite consent from the municipal authorities; and (2) that the conditions attached to the consents procured by the defendant are not available to the plaintiff, because those conditions are void. As the plaintiff has consents from the village of New Brighton and from the abutting property owners, the first objection seems to be based wholly on the absence of an express consent from the former board of supervisors of Richmond county to the plaintiff. Assuming that the control which the board of supervisors exercised over county roads made its consent necessary to the operation of a railroad upon a county road within a village, I think that the action of the board in adopting the resolution granting the franchise to the defendant upon the conditions which have been stated, providing for common trackage in favor of a connecting company situated like the plaintiff; and the subsequent action of the board in granting to the plaintiff authority to construct its railroad to the very head of South street, where were the tracks of the defendant, must be regarded as constituting a consent that the plaintiff should operate its line over South street to the ferry.

As to the second point, which attacks the validity of the conditions in the grant to the defendant, designed to prevent that grant from being exclusive, it is to be noted that the defendant not only accepted the franchise thus conditioned, but entered into an elaborate contract under seal with the village of New Brighton, expressly declaring that the consent should not be deemed to confer an exclusive franchise, and binding itself to observe the conditions aforesaid. Section 102 of the Railroad Law provides that no street surface railroad corporation shall operate its road in that portion of a street in which a street surface railroad is or shall be lawfully constructed, without first obtaining the consent of the corporation owning and maintaining the same, except that any street surface railroad company may, under certain circumstances, acquire the right to use the



tracks of another street surface railroad company for a distance not exceeding 1,000 feet. (Laws of 1890, chap. 565, § 102, as amended by Laws of 1894, chap. 693.) The language of this section leaves no doubt that the defendant, after having constructed its own line in South street, could, by granting its consent thereto, authorize the operation of the plaintiff's railroad in South street over the same tracks. If it could give its consent afterward it could give its consent in advance of the construction of its own line, and that was exactly what it did in the present case. I am of the opinion that, by entering into the contract and stipulations which the defendant made with the municipal authorities, it gave its consent to the operation, in the streets embraced in its franchise, of the line of any other corporation coming within the terms of the contract; and the plaintiff is such a corporation.

If this view is correct, it is difficult to perceive any sufficient reason for pronouncing the conditions void which are contained in the consents and contract. I can find no doctrine which would invalidate them laid down in either of the leading cases upon which the learned counsel for the defendant rely. (*Matter of Kings County Elevated R. R. Co.*, 105 N. Y. 97; *Beekman v. Third Ave. R. R. Co.*, 153 id. 144.) The conditions there under consideration were in conflict with the purposes of the respective statutes regulating the proceedings. The stipulations in question here, when made, were simply promises to do in the future what the Railroad Law empowered the defendant to do, whether it had made any promise on the subject or not; that is, allow another railroad company to operate its line in the same street and on the same tracks.

In the litigations relating to the occupation of South street, it does not appear that the plaintiff has made any election of remedies which is fatal to the maintenance of this action. As to the other questions arising on the motion, it is enough to say that they are sufficiently discussed and satisfactorily disposed of in the opinion of the learned judge at Special Term.

The injunction was properly granted and should be allowed to stand until the determination of the suit.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

MARGARET E. LITTLEJOHN, Respondent, v. LUCY A. LITTLEJOHN LEFFINGWELL, Individually and as Sole Executrix, etc., of DE WITT C. LITTLEJOHN, Deceased, who was the Sole Executor and Trustee, etc., of ALIDA M. LITTLEJOHN, Deceased, and ELISHA DYER LEFFINGWELL, Appellants, Impleaded with Another.

*Service of summons by publication — when a second order therefor is properly obtained to protect the plaintiff — sufficiency of the order under section 440, Code of Civil Procedure — attempt to begin an action by mailing a summons to a sheriff which reaches him after his term has expired — the relation of the outgoing to the incoming sheriff.*

An attorney for the plaintiff in an action, who has been notified by the defendants that they would move to vacate an order obtained for the service of the summons therein by publication on account of the alleged insufficiency of the affidavits upon which it was granted, may properly obtain a second order of publication with a view to protecting his client against the mischance of having the first order adjudged to be defective.

An order of publication which directs that "the plaintiff deposit in the post office at the city of Brooklyn a set of copies of the summons and complaint in this action, and of this order \* \* \* directed to the said defendants, Lucy A. Littlejohn Leffingwell and Elisha Dyer Littlejohn, at Cairo, Egypt," is a substantial compliance with the provisions of section 440 of the Code of Civil Procedure.

The mailing of a summons on the 30th day of December, 1897, to the then sheriff of a county, which did not reach him until the 1st day of January, 1898, when his successor, although entitled to the office of sheriff, had not taken possession of the same or served upon the outgoing sheriff the certificate required by sections 182 and 183 of the Code of Civil Procedure, constitutes an attempt to commence an action, within the meaning of section 399 of the Code of Civil Procedure.

*Semble*, that the outgoing sheriff, while retaining possession of the office awaiting the advent of the new sheriff, is to be considered as his agent in receiving such process as comes into his hands until the transfer of the office is complete.

APPEAL by the defendants, Lucy A. Littlejohn Leffingwell, individually and as sole executrix, etc., of De Witt C. Littlejohn, deceased, and Elisha Dyer Leffingwell, from so much of an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 10th day of June, 1898, as denies said defendants' motion to vacate an order of publication made in the action, and denies their motion to vacate the service of the summons under said order of publication.

*Henry B. Hathaway*, for the appellants.

*William E. Warland*, for the respondent.

WILLARD BARTLETT, J. :

We will consider, in the order in which they are presented in the appellants' brief, the several objections which are made to the order of publication which the court below has refused to vacate :

(1) The first objection is that the order of publication was irregular, because at the time it was granted a prior order of publication was still in force.

We do not think that this objection is fatal. The plaintiff's attorney had obtained an order of publication and had received notice that the defendants would move to vacate it on account of the insufficiency of the affidavits upon which it had been granted. Fearing that such affidavits might not be sufficient to uphold the order against the attack thus threatened, the attorney, to guard his clients against the mischance of having the first order adjudged defective, obtained the order of publication in question on this appeal. It seems to us that, under the circumstances, his conduct in so doing should be commended as the adoption of a wise precautionary measure, instead of being held prejudicial to the validity or regularity of the second order. It is to be borne in mind that there is no question here of the oppressive use of either order.

(2) It is argued that the order of publication does not comply with the requirements of the Code in respect to the directions which it must contain.

It directs that "the plaintiff deposit in the post office, at the city of Brooklyn, a set of copies of the summons and complaint in this action, and of this order \* \* \* directed to the said defendants, Lucy A. Littlejohn Leffingwell and Elisha Dyer Leffingwell, at Cairo, Egypt."

Section 440 of the Code of Civil Procedure prescribes that such an order must contain a direction that "the plaintiff deposit in a specified post office one or more sets of copies of the summons, complaint and order, \* \* \* directed to the defendant at a place specified in the order."

We think that the language of the order was a substantial compliance with the law. The direction was broad enough to authorize

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a set of copies of the papers to be sent to each of the absent defendants, and it seems that this was actually done.

(3) It is contended that the affidavits failed to show due diligence in attempting to serve the defendants personally within the State.

We have carefully examined the papers on this point, and, without reviewing here in detail the facts which are stated in the affidavit, we are satisfied that they were amply sufficient to give the court jurisdiction.

(4) The case was one in which it was necessary to show that an attempt had been made to commence the action against the defendants by delivering the summons to the sheriff of Schuyler county prior to the 3d day of January, 1898; and the appellants contend that the proof fails to show any delivery whatever of the summons to the sheriff for service.

It appears that on the 30th day of December, 1897, the summons was mailed to Alva S. Fitzgerald, then sheriff of Schuyler county, but that it did not reach him until the 1st day of January, 1898. At that time a successor was entitled to the office of sheriff, but had not yet taken possession of the same, or served upon Mr. Fitzgerald the certificate required by sections 182 and 183 of the Code of Civil Procedure. Those sections read as follows :

“Where a new sheriff has been elected or appointed, and has qualified and given the security required by law, the clerk of the county must furnish to the new sheriff a certificate, under his hand and official seal, stating that the person so appointed or elected has so qualified and given security.

“Upon the commencement of the new sheriff's term of office, and the service of the certificate on the former sheriff, the latter's powers as sheriff cease, except as otherwise expressly prescribed by law.”

These provisions are substantially the same as those contained in the old Revised Statutes. (2 R. S. 438, §§ 67, 68.) The Revised Statutes prescribed, just as the Code does, that upon the service of the certificate upon the former sheriff, his powers as sheriff, except when otherwise expressly provided by law, shall cease. This provision was interpreted by the old Supreme Court to mean that until the certificate of the clerk was served upon the old sheriff he had authority to execute process placed in his hands as sheriff, and that the powers of the old sheriff did not cease until the powers of the

new sheriff became complete. (*Curtis v. Kimball*, 12 Wend. 275.) This construction is just as applicable to the Code as it was to the Revised Statutes, and it makes the delivery of the summons in this case to Mr. Fitzgerald an attempt to commence an action within the meaning of section 399 of the Code of Civil Procedure.

There is another view in which the delivery may be deemed sufficient. If there were no question of a certificate in the case at all, it might fairly be held that Mr. Fitzgerald, retaining possession of the office of sheriff, as he did at the time he received the summons and awaiting the advent of the new sheriff, was the agent of the latter in receiving such process as came into his hands until the transfer of the office was complete.

(5) Finally, we are asked to vacate the order of publication on the ground that the complaint upon which it is founded does not set out a sufficient cause of action against the defendants to be served.

The complaint cannot be regarded as insufficient to warrant the granting of some relief to the plaintiff without adopting a highly stringent and technical construction of the pleading—more stringent and technical than we think is fairly justified by the language of the pleader.

The order appealed from is affirmed, with costs.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

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MAUD S. NADEL, Respondent, *v.* HENRY C. FICHTEN, Appellant.

*Negligence—defect in the stairs of a tenement house—constructive knowledge thereof on the part of the landlord—obligation of the landlord to light the halls and stairways.*

Although, in an action brought by a tenant of a tenement house against the landlord to recover for injuries sustained from a fall, occasioned by a defect in the rubber facing on one of the steps of the stairs, which there was evidence tending to show had existed for a week, there is no proof that the landlord had actual notice of such defect, yet, when he testifies that he collected the rents of the premises and, as he lived next door, visited them every day, attending to the repairs, and a janitress employed by him to sweep the stairs and light the lamps testifies that she went up and down the stairs every day, the jury

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may properly, despite the denial of both witnesses that the stairs were in a bad condition, find with the plaintiff that the landlord should have known of the defect.

*Seemle*, that the landlord of a tenement is not under any legal obligation to light the halls or stairways therein.

APPEAL by the defendant, Henry C. Fichten, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 24th day of June, 1898, upon the verdict of a jury for \$850, and also from an order entered in said clerk's office on the 1st day of July, 1898, denying the defendant's motion for a new trial made upon the minutes.

*James W. Ridgway*, for the appellant.

*Herbert S. Worthley*, for the respondent.

WILLARD BARTLETT, J.:

The plaintiff was a tenant in a house in the borough of Brooklyn owned by the defendant. The hallway and stairs in this house were used by the several tenants thereof in common. The plaintiff, while on her way from the apartment which she occupied to the lower hall, fell upon the stairs and was injured. She alleged in her complaint that the injuries which she thus sustained were occasioned without any fault or negligence on her part, "but were caused by the negligence of the defendant in failing to properly light said hall and stairs, and in having said stairs covered, or partly covered, with torn or worn oilcloth or other material."

The landlord of a tenement house is not under any legal obligation to light the halls or stairways therein. (*Hilsenbeck v. Guhring*, 131 N. Y. 674.) Upon the trial all parties seem to have assumed that this was the law, and there was no suggestion, except in the complaint, that the defendant could be held liable by reason of the insufficient lighting of the place in which the plaintiff lived. The evidence in behalf of the plaintiff tended to show that the fall by which she was hurt was caused by the insecure condition of the rubber facing on the second step from the top of the stairway. According to her testimony she got her foot in under the rubber, and, in the attempt to extricate it, was violently thrown down, so that she fell the whole length of the stairs. At the close of the proof the case resolved itself into two questions: *First*, whether

the stairway actually was in a dangerous condition and that condition caused the plaintiff to fall; and, *secondly*, whether, assuming that the plaintiff's fall was thus occasioned by the unsafe and insecure condition of the rubber on the stairs, that condition had existed for so long a time, and under such circumstances, as to render the landlord chargeable with constructive notice of its existence. He could be held liable only if both these questions were answered in the affirmative. (*Henkel v. Murr*, 31 Hun, 28.)

As to the first question, the evidence was conflicting, but that adduced in behalf of the plaintiff was sufficient to sustain a finding in her favor.

As to the second question, there was no evidence that the defendant had actual notice of the defect and the trial judge so instructed the jury. The learned counsel for the appellant contends that there was no evidence from which it can properly be inferred that the landlord ought to have known of the defect if it existed, but I think that the record is adverse to his contention on this point. The plaintiff's brother-in-law swore distinctly and positively that the stairs were in bad condition, the rubber being torn slightly in the middle and loose on the first and second steps from the top; that he was a frequent visitor to the premises and noticed this condition particularly a week before the accident. The defendant testified that he collected the rent of the premises and visited the house every day as he lived next door and attended to the repairing there. The janitress whom he employed stated that it was her duty to sweep the stairs and light the lamps, and that she went up and down every day. Although both these witnesses denied that the rubber on the stairs was in bad condition at the time the plaintiff said she was injured, the jury may have found that the defendant and the janitress, his agent in charge of the premises, were mistaken on this point, and, furthermore, that they visited the hallway and stairs so often that they ought to have known of any dangerous defect which had existed there a week.

I think that there was sufficient evidence to sustain the verdict, and that, in view of the medical testimony, we should not deem it excessive.

I am, therefore, in favor of affirmance.

Judgment and order unanimously affirmed, with costs.

ISAAC D. PLACE, Respondent, v. JAMES H. CONKLIN and MARY F. CONKLIN, Appellants, Impleaded with SARAH A. PLACE and WALTER DUMVILLE.

*Brokerage on a marriage contract — payment of the broker's fee by the wife with property procured from the husband — the latter may sue for its recovery.*

Where a woman, in pursuance of a previous agreement made with a marriage broker employed by her, after her marriage procures money and land from her husband, who is ignorant of the agreement, and pays the broker his stipulated fee by turning over the money and giving a mortgage on the land to him, a suit is maintainable by the husband to recover such money from the broker and to annul the mortgage.

Although the property may have been turned over to the woman after she was married, in pursuance of a promise made at the time of the engagement, the whole transaction is vitiated by the conspiracy between the would-be wife and the marriage broker to obtain the marriage brokerage fee from the husband.

APPEAL by the defendants, James H. Conklin and Mary F. Conklin, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Orange on the 23d day of March, 1898, upon the decision of the court rendered after a trial at the Orange Special Term.

*John Miller*, for the appellants.

*A. H. F. Seeger*, for the respondent.

WILLARD BARTLETT, J.:

In the case of *Duval v. Wellman* (124 N. Y. 156) a contract whereby a woman employed a man as a marriage broker to procure for her a husband was pronounced void as against public policy, and it was held that the woman was entitled to recover from the marriage broker the sum of fifty-five dollars which she had paid for his efforts in her behalf. Although she was a participant in the wrongful transaction she was deemed less blameworthy than the broker, and the court, therefore, felt warranted, under well-established rules, in granting her relief. To have done otherwise, as was pointed out by BROWN, J., who delivered the opinion, would have been to enable the defendant and others of the same ilk "to ply their trade and secure themselves in the fruits of their illegal transactions."

The present case goes a step further. Here the efforts of the broker were successful in bringing about the desired marriage. The



woman who employed him, in pursuance of a previous agreement between them, of which her husband had no knowledge, then procured money and land from her husband and paid the broker his stipulated fee by turning over the money to him and giving him a mortgage on the land. This suit is brought by the victimized husband, who thus unwittingly paid the marriage brokerage, to recover the money from the broker and annul the mortgage; and the court at Special Term has rendered judgment in favor of the plaintiff.

We find no difficulty in sustaining the judgment. If the action of *Duval v. Wellman* (*supra*) was maintainable by one who, although she was *particeps criminis* with the broker, was nevertheless not regarded as being *in pari delicto* with him, much more clearly is this suit maintainable by the husband here, who is wholly innocent in the transaction, and has simply been made the dupe of his wife and the marriage broker who conspired together to obtain the brokerage fee out of his property. Their agreement was unlawful, and he who has suffered from it may assert its illegality and have restored to him the property of which it has operated to deprive him.

The case comes before us upon the judgment roll alone, without any of the evidence. The appellants thus practically concede that the findings of fact are supported by the proof; and although they have filed exceptions to the findings of fact, as well as to the conclusions of law, they have no standing here except to question the correctness of the latter. They insist that the property having been turned over to the woman after she was married, in pursuance of a promise made at the time of the engagement, the marriage constituted a good consideration for the transfer; and that the money and land having thus become the property of the wife, she was at liberty under the law to do what she liked with her own. This argument, however, ignores the basic fact that the whole transaction was vitiated by the conspiracy between the would-be wife and the marriage broker to obtain the marriage brokerage fee from the hoodwinked husband. Upon the findings of fact, we entertain no doubt as to the correctness of the conclusions of law reached by the learned trial judge in this case.

The judgment must, therefore, be affirmed.

All concurred.

Judgment affirmed, with costs.

MARY BULLENKAMP, Appellant and Respondent, v. ANNIE BULLENKAMP, Respondent and Appellant.

34	193
43	511
84	193
43	510
52	623

*Fiduciary relation — transfer of land alleged to have been induced by — absence of a finding to that effect in the record on appeal.*

Upon the trial of an action to procure a reconveyance of land, testimony was given on behalf of the plaintiff that the plaintiff's brother, towards whom the plaintiff, the grantor of the land, entertained a warm sisterly affection, was the active agent of the grantee, his wife, in bringing about the conveyance thereof to the latter, and that both of them orally assured the grantor that the property would be returned to her.

*Held*, that an appellate court, where the record did not disclose any finding on this subject by the trial court, was not in a position to hold that the grantor had shown herself entitled to relief on the ground that the conveyance was procured through the influence of a confidential relation.

APPEAL by the plaintiff, Mary Bullenkamp, from so much of a judgment of the Supreme Court, entered in the office of the clerk of the county of Kings on the 5th day of July, 1898, upon the decision of the court rendered after a trial at the Kings County Special Term as adjudget: "That after the defendant received said conveyance she laid out and expended upon the said lands, for the benefit of the plaintiff in the matters shown below, the following sums of money: \$197.05 expended to satisfy a judgment against Henry Bullenkamp, under which supplementary proceedings were instituted; \$228.02 expended in lawyer's fees on supplementary proceedings, premiums on insurance that Henry Bullenkamp's daughter collected, and other bills of Henry Bullenkamp; \$755.40 for interest and taxes on the land in question, paid by the defendant before the one thousand dollars was raised by her on mortgage; \$534.66 for lumber and labor for putting up advertising fences from which considerable income for advertising was received." And also from so much of the decree herein as provides in paragraph 5, "That the plaintiff must repay said Amelia E. Louis or satisfactorily secure to her the sum of \$1,050 and interest thereon, and until such action is taken, as will discharge or secure such indebtedness to Mrs. Louis, the aforesaid sum of \$1,050 shall constitute a charge and equitable lien upon the

land below described." And also from so much of the decree herein as provides in paragraph 6, "That the plaintiff should pay to the defendant the sum of \$2,290.06, the aggregate of the moneys claimed to have been expended by her on account of and for the benefit of the lands in suit or lose all right in and to such lands." And also from so much of the decree herein as provides in paragraph 7, "That upon the compliance with the direction and provisions of paragraphs five and six of this decree the defendant is directed to execute, duly acknowledge and deliver to the plaintiff herein a good and sufficient deed of the lands below described." And also from so much of the decree as provides in paragraph 8, "But this direction and decision is made upon condition and not otherwise that the plaintiff comply with the provisions of paragraphs five and six of this decree and make the payments therein provided for and so pay or secure said Amelia E. Louis for or on account of the loan made by her upon the promissory note of the plaintiff within ninety days from June 22, 1898." And also from so much of the decree herein as provides in paragraph 9, "That if the plaintiff fails to make the payments and give the security herein prescribed as necessary to entitle her to a reconveyance within the time herein limited, that then a further judgment may be entered at the foot of the decree forever barring and determining all the plaintiff's rights in or to such land or any of it and all right or remedy in any manner against the defendant."

Also an appeal by the defendant, Annie Bullenkamp, from the whole of said judgment.

*Cromwell G. Macy*, for the plaintiff.

*George Edwin Joseph* [*Alex. S. Bacon* with him on the brief], for the defendant.

WILLARD BARTLETT, J.:

This is a curious case. In 1890 Henry Bullenkamp was engaged to be married to Amelia E. Louis, and he borrowed from her \$1,050, to be applied to the purchase of the lots near Ocean Parkway in Kings county, which are the subject of controversy in this action. At the instance of Henry Bullenkamp the lots were conveyed by the vendor to the plaintiff, Mary Bullenkamp, Henry's sister, and, in

order to assure to Mrs. Louis the repayment of the \$1,050 thus loaned by her, Henry Bullenkamp procured the plaintiff, his sister, to execute and deliver to Mrs. Louis her promissory note for that amount. It may be stated here that this promissory note has never been paid and has apparently become barred by the Statute of Limitations.

Although he was engaged to Mrs. Louis for a number of years, Henry Bullenkamp did not marry her, but eventually became the husband of the lady who figures in this litigation as the defendant Annie Bullenkamp, now his widow.

In December, 1896, the plaintiff having the legal title to the real estate in question and the possession thereof, acquired through her brother in the manner which has been stated, conveyed the property at his instance to Annie Bullenkamp, the defendant (who had then become his wife), for a nominal consideration. The present suit is instituted by his sister, the grantor, to obtain a reconveyance of the lots. The learned court at Special Term has directed that the defendant reconvey the land in controversy to the plaintiff upon certain conditions set out in the decree. Both parties have appealed, the defendant being dissatisfied that the plaintiff should have obtained any relief at all, and the plaintiff being dissatisfied with some of the conditions which the judgment imposes upon her.

The finding upon which the judgment rests, so far as the direction to reconvey is concerned, is in these words: "*Second.* That on the 17th day of December, 1896, the plaintiff signed, duly acknowledged and delivered a deed to the defendant of the land above described for a nominal consideration, and with the intention and purpose of enabling the defendant to raise money with which to make expenditures for the benefit of the plaintiff and relieving the land of charges against the same, and further that said conveyance was made to the defendant upon her declaration and agreement that the defendant would reconvey said land to the plaintiff."

This finding refers to an oral promise to reconvey. There is no pretense or suggestion in the evidence of any written promise. The finding, therefore, makes out nothing more than a case of the mere breach of an oral agreement for the conveyance of an interest in land, which courts of equity are not authorized to enforce. (*Wood v. Rabe*, 96 N. Y. 414; *Hutchinson v. Hutchinson*, 84 Hun, 482.)

It is true that there is testimony in this record which, if believed by the learned trial judge and made the basis of a proper finding of fact, might bring the case within the principle asserted in *Goldsmith v. Goldsmith* (145 N. Y. 313) in respect to the creation of an implied trust in real property by means of a parol agreement in regard to the disposition thereof, between persons standing in a confidential relation to one another. Indeed, the counsel for the defendant expressly concedes that the Statute of Frauds can be avoided where one person holds a relation of confidence and trust to another and takes advantage of that relationship, as a father to a child or a guardian to a ward, to obtain property under a parol agreement to reconvey. He insists, however, that this doctrine has no application to a relationship no more confidential than that between sisters-in-law of mature years. Yet it is to be borne in mind that the brother of the grantor here, toward whom she evidently entertained a warm sisterly affection, was the active agent of the grantee, his own wife, in bringing about the conveyance to the latter, and that if the testimony in behalf of the plaintiff is true, both he and his wife assured her that the property would be returned to her. I am by no means prepared to say that this evidence would not justify the court in holding that the property was acquired through the influence of a confidential relation, in such a manner as to entitle the plaintiff to relief under the doctrine of *Goldsmith v. Goldsmith* (*supra*) and similar cases. But the trouble is that we have in this record no finding on the subject. We do not know whether the learned trial judge believed or did not believe the testimony tending to show that Henry Bullenkamp was the real party in interest in the transaction and in participation with the defendant, got his sister, by reason of the confidential relationship between them, to deed the lots to his wife.

In the absence of a determination of this and similar questions suggested by the record, it is impossible for this court to hold that the plaintiff has shown herself entitled to prevail in the action. Hence, there must be a new trial, upon which, perhaps, she may present these issues in such a way as to have them decided. We ought to add, however, that if she had made out a case for a reconveyance, the court was not authorized to charge the land with anything more than the moneys expended by the defendant for interest

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and taxes. The court at Special Term went so far as to make the granting of any relief to the plaintiff conditional upon her paying or securing the payment to Amelia Louis of the \$1,050 loaned by that lady to Henry Bullenkamp under the circumstances already narrated. Mrs. Louis was not a party to this action, nor does it appear that she has ever made any claim of any kind against the property in suit. We know of no theory recognized in the law upon which the money obtained by Henry Bullenkamp from Mrs. Louis can be made a lien on this property, in the manner attempted in this judgment.

If the decree under review were correct in this respect, an outlawed note would be just as good security as a subsisting mortgage.

The judgment should be reversed and a new trial granted, costs to abide the final award of costs.

All concurred; CULLEN, J., in result.

Judgment reversed and new trial granted, costs to abide the final award of costs.

HENRY GERLACH, Appellant, v. WILLIAM BRANDRETH, as President,  
JOEL D. MADDEN and Others, as Trustees of the Village of Sing  
Sing, New York, and Others, Respondents.

84	197
77	502
34	197
83	108

*Municipal corporation — action by a taxpayer against village trustees who have made excessive appropriations — injury peculiar to him need not be shown.*

A taxpayer in a village may properly maintain an action against the members of the board of trustees thereof, who have appropriated for the expenses of the village during a fiscal year \$6,700 more than the village charter allowed, and have ordered drafts for that amount to be drawn on the village treasurer.

In such a suit it is not necessary for the taxpayer to show injury peculiar to himself from the act of the public officials.

APPEAL by the plaintiff, Henry Gerlach, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Westchester on the 7th day of May, 1898, upon the decision of the court rendered after a trial at the Westchester Special Term dismissing his complaint on the ground that

it did not state facts sufficient to constitute a cause of action, with notice of an intention to bring up for review, upon such appeal, an order made at the Westchester Special Term, and entered in said clerk's office on the 7th day of May, 1898, dismissing the complaint.

*Frank L. Young*, for the appellant.

*Smith Lent*, for the respondents.

WILLARD BARTLETT, J. :

In granting the motion for the dismissal of the complaint, which was made before any testimony was taken, it is evident that the learned court, at Special Term, must have misapprehended or overlooked the allegations of the complaint, which are to be found in the subdivisions of the complaint numbered 4th and 8th.

In the 4th subdivision it is alleged, in substance, that the charter of the village of Sing Sing,\* as amended in 1897 (Laws of 1897, chap. 496), empowered the board of trustees to assess, levy and collect upon the real and personal property, within the limits of said village, a sum not to exceed \$20,000 in any fiscal year, to be expended to defray the general expense of said village, and that the same statute declared that the board should have no power to contract any debt or liability or enter into any obligation or appropriate any money exceeding the amounts therein prescribed.

In the 8th subdivision of the complaint it is alleged that the defendants, who constitute the board of trustees of the village of Sing Sing, have contracted debts and liabilities and have entered into obligations and have appropriated money during the fiscal year ending on the second Tuesday in March, 1898, and have ordered drafts drawn upon the treasurer of the village therefor, "and appropriated on the general expense account a sum exceeding the amount which, by law, they were entitled to expend, in the sum of six thousand seven hundred (\$6,700) dollars." Then follows an allegation that the said drafts are illegal and void as against the village.

We do not see why these averments are not sufficient to enable a taxpayer, like the plaintiff, to maintain a suit against public officers to restrain illegal official acts under the Code and statutes, authorizing this form of action. (Code Civ. Proc. § 1925; Laws of

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\* Laws of 1896, chapter 88. — [REP.]

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1892, chap. 301;\* *Talcott v. City of Buffalo*, 125 N. Y. 280; *Ziegler v. Chapin*, 126 id. 342.)

The opinion of the learned judge who heard the case at Special Term indicates that he gave no force or effect to the averment that the trustees, being empowered to appropriate not more than \$20,000 for general expense in any fiscal year, had in fact appropriated in one such year \$6,700 more than the law allowed, for which they had ordered drafts drawn on the village treasurer. Such a state of facts presented a *prima facie* case of illegal official action, the further prosecution or consummation of which might well be opposed by a taxpayer's suit, under the legislation to which we have referred. In such a suit it is not necessary to show, as the defendants here seem to suppose, that the plaintiff will suffer peculiar injury. It is enough for him to show that he has the status as a taxpayer which the statutes prescribe, and that the act of the defendants is one which the law forbids.

For these reasons, without reference to the other points discussed upon the argument, we think it was error to dismiss the complaint on the ground stated.

All concurred.

Judgment reversed and new trial granted, costs to abide the final award of costs.

RALPH WISNER, Respondent, v. CONRAD SCHOPP, Appellant,  
Impleaded with JAMES SMITH.

*Payment — delivery by a vendee to his vendor of checks stated to be in full payment — retention of the checks by the vendor, who states that he will accept them upon account.*

- A vendee of a quantity of onions refused to accept them on the ground that they did not conform to the terms of the contract of purchase, and, by direction of the vendor, sold them for the latter's benefit and on his account, and remitted the proceeds of such sale to him by two checks, one stated to be "In full payment on onions shipped Apr. 20th," the other "In full payment 2 cars onions, 18173 and 50335."

\* Amending chapter 531, Laws of 1881.—[REP.]

	84	199
	54	413
34		199
70		1494



The first check was indorsed by the vendor and collected, and the second was indorsed by him "Accepted on account, Ralph Wisner," and was also collected. The vendor acknowledged the receipt of the first check in a letter to the vendee stating that he would give the vendee credit for its amount and would look to him for the balance of \$399, which would have been the amount due from the vendee if he had accepted the onions. The vendor also acknowledged the receipt of the second check in a letter to the vendee which stated that he had given the vendee credit therefor and that he looked to him for the balance.

*Held*, that the retention of these two checks by the vendor and the collection of the money thereon under the circumstances operated to relieve the vendee from any liability by reason of his rejection of the onions, whether that rejection was, in the first instance, justifiable or not.

APPEAL by the defendant, Conrad Schopp, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Orange on the 11th day of April, 1898, upon the verdict of a jury, and also from an order, bearing date the 22d day of January, 1898, and entered in said clerk's office, denying said defendant's motion for a new trial made upon the minutes.

*Henry Bacon*, for the appellant.

*M. N. Kane*, for the respondent.

WILLARD BARTLETT, J. :

This is a controversy over three carloads of onions which were shipped by the plaintiff, as vendor, from Orange county, to the defendant, as vendee, at St. Louis. The defendant refused to accept the onions upon the ground that they did not conform, either in quality or condition, to the terms of the contract of purchase; and after some correspondence with the plaintiff, advising him of his refusal to take the goods, the defendant sold the onions in St. Louis, by plaintiff's direction, for his benefit and on his account. There is no dispute but that the proceeds of these sales were duly remitted to the plaintiff. The present suit does not concern those proceeds, but is brought to recover damages against the defendant on the ground that the onions, when they reached St. Louis, were in all respects what the plaintiff had agreed to deliver there, and that the defendant was not justified in refusing to accept them and pay for them.

There was conflicting testimony as to the actual quality and condition of the onions, so that the question of whether they were

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properly rejected or not was a question for the jury. There is another feature of the case, however, which I think demanded the direction of a verdict in favor of the defendant.

The proceeds of the sales made by the defendant in St. Louis, after he had informed the plaintiff of his rejection of the onions, were remitted to him in two checks. The first check was drawn on the German-American Bank of St. Louis, under date of May 1, 1894, and it directed that bank to pay to Ralph Wisner or order \$251 "In full payment on onions shipped Apr. 20th." The plaintiff duly indorsed this check and obtained the money thereon. The second check was drawn on the same institution, under date of May 29, 1895, and directed the bank to pay to the order of Ralph Wisner \$319.03 "In full payment 2 cars onions, 13173 and 50335." The plaintiff indorsed this check "Accepted on account, Ralph Wisner," and duly collected the amount thereof. The plaintiff testifies that upon receiving the first of these checks he wrote to the defendant telling him that he had received his check for \$251, and would give him credit for that and look to him for the balance of \$399. This balance would have been the amount due from the defendant if he had accepted the onions. The second check was accompanied by a letter from the defendant in reference to the two carloads of onions mentioned therein, in which he wrote: "We herewith inclose you sales and check for last two car onions. They, no doubt, will make you a loss, but you can only blame yourself, as such stock as this had no right to be shipped our way at all this late in the season, but should have been sold near by and quickly used up." Upon the receipt of this communication the plaintiff wrote to the defendant that he had received his check for the two carloads of onions, given him credit therefor, and looked to him for the balance.

I think that the retention of these two checks and the collection of the money thereon, under the circumstances, operated to relieve the defendant from any liability by reason of his rejection of the onions, whether that rejection was, in the first instance, justifiable or not. The learned trial judge instructed the jury in respect to this branch of the case as follows: "But I say to you that if the defendant, Mr. Schopp, when he sent those checks, sent them to the plaintiff in full settlement and compromise of the claim for damages

arising out of these transactions, as well as of the purchase price which the goods brought in St. Louis—in other words, if his intent was that he would sell the goods for whatever they would bring on account of the plaintiff and pay him that in liquidation of the entire claim for damages and everything connected with them, and if the plaintiff so understood it or should have understood it from the letters which accompanied the checks, or from the surroundings of the transaction, that then the checks, if used, were to be taken in full payment, and the plaintiff cannot recover anything, no matter if he did write the letters repudiating their acceptance as payments in full.”

It would have been proper to leave this question to the jury if there had been any substantial dispute in the testimony on the subject or any evidence from which conflicting inferences of fact could reasonably be drawn; but there was no substantial dispute on the subject, and it seems to me that the proof warrants only one inference, and that is that the plaintiff did understand or should have understood, from the checks themselves and the correspondence, that the checks were tendered only in satisfaction of any and all claims which the plaintiff might have on account of the action of the defendant in regard to the respective carloads of onions.

It is argued that, irrespective of any claim which the plaintiff had against the defendant for damages growing out of his rejection of the goods, the plaintiff was entitled to receive whatever the defendant had collected upon his sale of the onions on his account after he had rejected them, and that the words “in full,” used in the checks, may be understood as applying to the full payment of the proceeds of such sales. But the testimony of the plaintiff himself shows that such could not have been his understanding, and that he must have known that the defendant, in sending the checks in the form in which he did, intended to embrace and adjust every possible claim against him which could arise out of his transactions with the plaintiff relative to these onions. Otherwise it is impossible to imagine why he should have taken the pains to write letters stating, in substance, that he would keep the checks on account and hold the defendant liable for the amount of the purchase price.

It seems to me that the facts bring the case within the principle laid down in *Nussoiy v. Tomlinson* (148 N. Y. 326) and the cases

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there cited. The position of the plaintiff here was that the defendant owed him upwards of a thousand dollars more than was represented by the checks which he sent him. Evidently apprehensive that the plaintiff would insist upon his claim for this amount, the defendant, in forwarding his checks for the sums which he conceded to be due, drew them in such a form as to call the plaintiff's attention to the fact that he intended them in satisfaction of his entire liability in the matter, and also transmitted with the second check a letter, from which I have quoted above, which made this intention still more manifest. Under these circumstances, as was said by the Court of Appeals in *Fuller v. Kemp* (138 N. Y. 231), "the acceptance of the money involved the acceptance of the condition, and the law will not permit any other inference to be drawn from the transaction."

I think the judgment should be reversed.

All concurred, except HATCH, J., absent.

Judgment and order reversed and new trial granted, costs to abide the event.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. THEODORE B. WILLIS and WILLIAM E. PHILLIPS, Respondents.

*Conspiracy — sufficiency of an indictment alleging an agreement between a public officer and a private person by which the officer is to violate his duty — specification of the time — allegation that "Theodore B. Willis, as commissioner of city works," entered into a conspiracy.*

An indictment which alleges an agreement between a public officer and a private person (the parties indicted), in terms providing that the public officer shall willfully neglect and violate any duty enjoined upon him by law, the neglect and violation of which shall appear to both parties to be effective to aid the private person in obtaining money, without specifying what that duty may be, and which specifies five overt acts as having been done to effect the object of the alleged conspiracy, charges a criminal conspiracy under the laws of the State of New York.

Under such an indictment the time is sufficiently specified as "in or about the month of February, 1896, but on what particular day the grand jury is unable to more particularly set forth," and an allegation therein that the defendant Theodore B. Willis, *as commissioner of city works*, entered into the conspiracy, is to be considered as charging that he did so *while* he was commissioner of city works.

34 303  
158a 392

APPEAL by the plaintiff, The People of the State of New York, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Kings on the 24th day of September, 1898, upon the decision of the court rendered after a trial at the Kings County Special Term sustaining the defendants' demurrer to the indictment.

*Josiah T. Marcan, District Attorney, for the appellant.*

*Benjamin F. Tracy and De Lancey Nicoll [Albert E. Lamb and John D. Lindsay with them on the brief], for the respondents.*

WILLARD BARTLETT, J. :

This is an appeal in behalf of the People from a judgment in the court below sustaining a demurrer to the indictment. The indictment charges the defendants with conspiracy, and sets out five overt acts as having been done to effect the object of the alleged conspiracy. The demurrer has been allowed on the ground that the indictment does not contain a plain and concise statement of the act constituting the crime, and that the facts stated in said indictment do not constitute a crime.

In order to pass intelligently upon the questions presented for review on this appeal, it is necessary to examine the indictment analytically and ascertain precisely what the accusation is against the demurring defendants. In this examination we may leave out of consideration the "divers other persons to the Grand Jury unknown" who are mentioned in the indictment, for it is enough if there is a good charge of conspiracy against the named defendants.

An analysis of the indictment shows that it charges a conspiracy between the defendants Phillips and Willis, wherein and whereby it was agreed that Willis, "in order to aid and support and render effective" demands of money to be made by Phillips from persons then or thereafter contracting or desiring or offering or intending to contract for the performance or furnishing to the city of Brooklyn, labor or materials, in cases falling within the scope of the powers and duties of Willis, as city works commissioner (he, the said Willis), should and would "willfully neglect, omit and actively violate his duty as such Commissioner of City Works as aforesaid,

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imposed by law, and permit his subordinates to omit, neglect and violate their duties as such, in any particular in which such neglect, omission or violation should to them, the said Theodore B. Willis and the said William E. Phillips, and such divers other persons, or any of them, appear to be effective to aid said William E. Phillips and such divers other persons in obtaining money from such persons or contractors as aforesaid."

The pleader did not see fit to charge that the obtaining of the money from the contractors by Phillips, as contemplated by the conspirators, was in any respect unlawful, although it is difficult to perceive how it could be otherwise than illegal. In the view of the law, therefore, the conspiracy sought to be set out in this indictment is a conspiracy "to make use of means themselves the subject of indictment, to effect an indifferent object." (2 Whart. Cr. L. [10th ed.] § 1358.)

These means in the present case were the willful neglect, omission and active violation of his official duties by the defendant Willis.

They constitute a crime under the laws of this State. "A public officer, or person holding a public trust or employment, upon whom any duty is enjoined by law, who willfully neglects to perform the duty, is guilty of a misdemeanor." (Penal Code, § 117.) There is a similar enactment in section 154 of the Penal Code.

Under the laws of this State if two or more persons conspire to commit a crime each of them is guilty of a misdemeanor. (Penal Code, § 168.) No agreement, however, except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy in this State unless some act besides such agreement be done to effect the object thereof by one or more of the conspirators. (Penal Code, § 171.) In the case of a conspiracy to commit a crime it matters not whether the crime contemplated is the main object or end sought to be attained by the conspirators, or only a means to that end. It is enough to constitute a conspiracy that the parties, whatever the incentive to the agreement may be or whatever part it may play in a larger scheme, have agreed together to commit a crime.

In the court below the indictment has been condemned as defective because the pleader has not set out what was the public duty of the defendant Willis in the premises, and has not pointed out the

violation thereof which the parties had in contemplation. "What were the powers and duties of Willis as commissioner of city works," asks the learned judge, "with respect to persons contracting to perform labor for, and to furnish materials to, the city? What was the character of the duties which the conspirators contemplated he should neglect, omit and willfully violate, and in what manner were these neglects, omission and violations of duty to be perpetrated? In what manner and to what extent would these neglects, omissions and violations of duty aid, or tend to aid, the demand of money from persons contracting with the city?"

Because the indictment does not answer these questions, it is declared not to contain the plain and concise statement of the act constituting the crime within the requirements of section 275 of the Code of Criminal Procedure.

It seems to us that this conclusion is based upon a misconception of the rules of criminal pleading as applied to the crime of conspiracy. In the nature of things the charge cannot be made any more definite than was the actual agreement of the conspirators. If the conspiracy was indefinite, the pleader cannot be called upon to state a definite conspiracy in order to make the indictment good. Particulars cannot be pleaded which did not enter into the agreement. The real question is whether such agreement, as is stated in the indictment, no matter how indefinite it was, and no matter how general in its terms, constitutes a criminal conspiracy under the statute.

We do not see why it was necessary to set out in the indictment the duties which were imposed by law upon the defendant Willis as commissioner of city works. The charter of the city of Brooklyn (Laws of 1888, chap. 583), which prescribed the duties of that officer, was a public statute, of which the courts of this State were bound to take judicial notice, without formal allegation or proof. The alleged conspiracy was not an agreement to neglect or violate any particular one of those duties, but such of them as should thereafter seem to the conspirators to be effective in carrying out their object. If these were actually the terms of the compact, the conspiracy could not truthfully be charged otherwise than it is charged in the indictment, so that the discussion brings us down to the question upon which this branch of the case turns, and that is whether

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an agreement between a public officer and a private person, which in terms provides that the public officer shall willfully neglect and violate any duty enjoined upon him by law, the neglect and violation of which shall appear to both parties to be effective to aid the private person in obtaining money, without specifying what that duty may be, is a criminal conspiracy under the laws of this State. If it is, we think such a conspiracy is sufficiently charged in this indictment. If it is not, of course, the indictment falls.

We cannot doubt that such a compact is a crime. To hold otherwise would be to adopt a rule which would free all conspirators from criminal liability if they only took care to make their agreement sufficiently general in its terms. On this point the language used in a celebrated case by Chief Justice WILLARD, of South Carolina, furnishes a cogent argument: "To illustrate the principle involved, suppose that a conspiracy had been formed to rob on the highways, but no person had been designated as the special subject of such robbery, and no definite place or means of overpowering the victims of the plot formed part of the agreement of conspiracy. Money and arms are collected to carry out the conspiracy, the band is divided, distributed and posted, some for purposes of direct attack, others to watch against surprise, and others to reinforce a weak party. No action has yet appeared to put in exercise the formidable combination of force and skill. At this stage of the operation the parties are arrested and charged with a conspiracy to rob. Must the charge fail because the terms of the conspiracy did not embrace circumstances of time, place and person, as it regarded the accomplishment of its purpose? \* \* \* It would be a just reproach to the common law if it afforded no means of dissipating combinations threatening the destruction of legal security, however formidable they might be, because the objects were general and threatened the community indefinitely, and were not aimed at some particular member of the community, or to some other limited and defined sphere." (*State v. Cardoza*, 11 S. C. 195, 234.)

There are few cases in the books dealing with conspiracies where the agreements of the conspirators are general in their terms, probably by reason of the fact that most conspiracies contemplate acts which are particularly specified when the criminal agreement is made. A leading case in Pennsylvania, however, in which the



agreement was somewhat analogous to that under consideration here, is *Commonwealth v. Gillespie* (7 S. & R. 469). There the first count of the indictment alleged that both of the defendants did conspire to sell and expose to sale and cause and procure to be sold and exposed to sale a lottery ticket and tickets in a lottery not authorized by the laws of the Commonwealth. This count was held to be good because the conspiracy was to sell *any* prohibited lottery tickets that the defendants could sell, not of any particular lottery, but of all.

It must be conceded that the view taken in the court below finds some sanction in the language used by Chief Justice WAITE in *United States v. Cruikshank* (92 U. S. 542) in which, among other things, we find this statement: "In Maine it is an offense for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison; \* \* \* but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been 'unlawfully and wickedly to commit each, every, all and singular the crimes punishable by imprisonment in the State prison.' All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defense by motion to quash, demurrer or plea; and the court, that it may determine whether the facts will sustain the indictment." In thus writing, however, we think it is evident that the learned chief justice did not have in mind an agreement, the actual terms of which should provide for the commission of all the crimes punishable in a certain manner. Can it be possible that, under the law of Maine, or the law of this State, if two or more persons entered into a written compact of this character, their agreement would not constitute a conspiracy? We think it would constitute a conspiracy beyond any manner of doubt. The generality of the agreement would not destroy its criminal character.

None of the other decisions cited by the defendants upon this branch of the case have any bearing upon the real question, which is whether, assuming the conspiracy to have been as general in its terms as that alleged in this indictment, it is punishable under the

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law, or whether the charge must fail because it cannot be set out with more particularity than the facts will warrant.

Our conclusion is that the demurrer should not have been sustained upon either of the grounds for its allowance stated in the judgment under review. Several other objections to the indictment, however, are presented in the brief for the respondents, and these should also be considered in disposing of the appeal.

It is contended that the indictment is fatally defective in not stating the time when the defendants entered into the alleged conspiracy. That time is stated to have been "in or about the month of February, 1896, but on what particular day the grand jury is unable to more particularly set forth." We think that this averment is sufficiently specific. "The precise time at which the crime was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the crime." (Code Crim. Proc. § 280.) In the case of *The People v. Emerson* (53 Hun, 437) the question considered related not to *pleading* the time when the alleged crime was committed, but to *proof* of the time, and it was held that it was competent to prove transactions on days other than the day named in the indictment. In *The People v. Olmsted* (74 Hun, 323) the information alleged that the defendant committed the crime "on various occasions of 1890 and '91." It was held by a majority of the General Term in the third department that this allegation as to time was defective. "Stating the offense to have been committed during two years, \* \* \* " said Mr. Justice HERRICK, "is not fixing any time at all." This is very different, however, from the allegation here, which fixes the time within a month. In *The People v. Polhamus* (8 App. Div. 133) the defendant was charged with having violated the Excise Law, "between April 1st, 1895, and July 5th, 1895, inclusive, and particularly on July 3d and 4th, 1895." It was held that the information was sufficiently definite as to time "to enable the defendant to have the benefit of the judgment as a plea in bar to a future prosecution." We think the same conclusion must be reached as to the allegation of time in the present case. It is true that in *Ledbetter v. United States* (170 U. S. 606) there is an intimation that an indictment

might be regarded as insufficient on demurrer which alleged the offense to have been committed "on the — day of April, 1896." Nevertheless the Supreme Court of the United States there held that this allegation as to time did not invalidate it on a motion in arrest of judgment; and it is to be noted that the statement of time in that case was capable of being regarded as no statement at all on account of the omission to fill the blank.

A further objection which the respondents make to the indictment is that it fails properly to set forth any overt act. We have examined in detail the criticisms of their learned counsel upon the several averments of the indictment with respect to the overt acts charged and find no defect therein which can fairly be regarded as serious, much less fatal.

As to the contention that the indictment charges more than one crime, within the meaning of sections 278 and 279 of the Code of Criminal Procedure, we are satisfied with the opinion of the court below on that subject. As to the suggestion that the indictment is fatally defective, because it charges that the defendant Theodore B. Willis, *as commissioner of city works*, entered into the conspiracy, we think that the word "as" is to be regarded as used in the sense of the word "being," so that the charge, in substance, is that he entered into the conspiracy while he was commissioner of city works.

The judgment should be reversed and a judgment entered disallowing the demurrer.

All concurred.

Judgment reversed and judgment directed disallowing demurrer.

JAMES V. LAWRENCE, as Sole Surviving Partner of the Firm of LAWRENCE BROTHERS, Appellant, v. JOHN DAWSON and WILLIAM ARCHER, Respondents, Impleaded with the BOARD OF EDUCATION OF THE CITY OF MOUNT VERNON and Others.

*Mechanic's lien — a payment by the principal contractor to a sub-contractor before it became due.*

A materialman, being about to file a lien against a sub-contractor, was assured by the principal contractors that the contract between them and the sub-contractor contained a provision for the retention of fifteen per cent of the amount due until the work was completed and "that said moneys had been and would be retained and said provisions and terms of said contract as to payment kept and observed by" them. In reliance upon these representations the materialman refrained from filing his lien for a period of more than six weeks, during which time the contractors, in violation of their representation, paid the fifteen per cent to the sub-contractor in advance of the terms of their contract with him.

The materialman then filed his lien, and in an action to enforce it, it was

*Held*, that under the provisions of section 7 of chapter 418 of the Laws of 1897 (the Lien Law), such payment, having been made prior to the time when it became due, for the purpose of avoiding the provisions of that act, was of no effect as against the lienor, and in the enforcement of the lien was not to be considered in determining the amount due from the contractors to the sub-contractor.

APPEAL by the plaintiff, James V. Lawrence, as sole surviving partner of the firm of Lawrence Brothers, from so much of a judgment of the Supreme Court, entered in the office of the clerk of the county of Westchester on the 25th day of June, 1898, upon the decision of the court rendered after a trial at the Westchester Special Term, as adjudges that the complaint be dismissed as to the defendants John Dawson and William Archer, and that the mechanic's lien filed herein by the plaintiff is not a valid lien upon the moneys deposited with the defendant, the Board of Education of the City of Mount Vernon, by the defendants Dawson and Archer, to discharge said lien and now held to await the result of the action.

*Ralph Earl Prime, Jr.*, for the appellant.

*Frank M. Tichenor*, for the respondents.

WILLARD BARTLETT, J. :

This is a mechanic's lien suit in which we are concerned only with a controversy between James V. Lawrence, as surviving partner of the firm of Lawrence Bros. on the one hand, and John Dawson and William Archer, composing the firm of Dawson & Archer, on the other. The controversy grows out of the construction of a schoolhouse in the city of Mount Vernon. Dawson & Archer were the contractors with the municipality for the erection of the building. They entered into a sub-contract with one John Burden under which he agreed to furnish all the materials required for the carpenter work, and to perform the carpenter work required by the terms of the principal contract. The plaintiff sold and furnished building materials to Burden in such quantity that on September 10, 1897, about \$2,500 or \$2,700 was due to him for such materials. In order to enforce his claim for this amount, the plaintiff at that time contemplated filing a mechanic's lien against the school property, but at an interview between his agent and Burden and the defendant Dawson, Burden and Dawson stated to the plaintiff's agent, as was the fact, that the terms of Burden's sub-contract provided for and required the retention by Dawson & Archer of fifteen per cent of the value of all work done under said sub-contract until final payment and completion, "and that said moneys had been and would be retained and said provisions and terms of said contract as to payment kept and observed by the defendants Dawson & Archer."

Relying upon these representations, the plaintiff refrained for the time being from filing any lien. On the very day of the interview, however, Dawson & Archer paid out \$3,000 to materialmen (Hartmann Bros.), between whom and Dawson & Archer there appears to have been no relation except such as grew out of the fact that Hartmann Bros. had supplied material to Burden which he put into the school building. Dawson & Archer also subsequently paid to Burden \$2,274.30 in advance of the terms of their sub-contract with him; that amount, representing the fifteen per cent already mentioned, not being payable under the terms of the contract before January 1, 1898. After these payments had been made, and on October 28, 1897, when a balance of \$1,825.92 remained due from Burden to the plaintiff, the plaintiff duly filed his lien.

In the statement of the facts thus far made, nothing has been

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included which was not found by the learned trial judge; but, notwithstanding the representations which have been recited, and notwithstanding the plaintiff's reliance thereon which led him to withhold the filing of his lien for more than six weeks, the learned trial judge holds that the facts and circumstances are not sufficient to justify a finding that the advance payment of the fifteen per cent to the sub-contractor was made for the purpose of avoiding the provisions of the Mechanics' Lien Law, and he does find in fact that such payment was not so made, but was made in good faith.

I think this finding is clearly against the weight of evidence, and should not be sustained.

The existing Lien Law contains the following provision: "Any payment by the owner to a contractor upon a contract for the improvement of real property, made prior to the time when, by the terms of the contract, such payment becomes due, for the purpose of avoiding the provisions of this article, shall be of no effect as against the lien of a sub-contractor, laborer or material man under such contract, created before such payment actually becomes due." (Laws of 1897, chap. 418, § 7.)

The opinion and decision in the court below are evidently based upon the assumption that this provision applies as well to any payment by a contractor to a sub-contractor as to any payment by the owner to the principal contractor. Upon the present appeal, however, the learned counsel for the respondents denies that this is the correct construction of the provision which has been quoted, and declares that there is no prohibition in the Mechanics' Lien Law against a contractor paying his sub-contractor in advance of the terms prescribed by the contract between them.

The provision in question is contained in section 7 of the statute which is included in article 1, and the 22d section declares that that article is to be construed liberally to secure the beneficial interests and purposes thereof.

In view of the construction which we gave to the provision of the former Mechanics' Lien Law (Laws of 1885, chap. 342), which was under consideration in *Smack v. Cathedral of the Incarnation* (31 App. Div. 559), I am of the opinion that section 7 of the present Lien Law should be held to embrace payments by the principal contractor as well as payments by the owner. It is to be noted that the

contract in the present case between Dawson & Archer and Burden, itself refers to Dawson & Archer as the owner, for it provides that should the contractor, meaning Burden, at any time during the progress of the work refuse or neglect to supply a sufficiency of materials or workmen, the owner (which must mean Dawson & Archer, and cannot possibly mean anybody else in this sub-contract between these parties) shall have the power to finish the work and deduct the expense from the amount of the contract. For the purposes of this litigation, therefore, the parties have themselves voluntarily assumed the characters of owner and contractor respectively, and it is certainly not a forced construction of this provision of the Lien Law, so far as they are concerned, to apply it to the advance payments which were made by Dawson & Archer to Burden.

The circumstances of the interview of September 10, 1897, must be considered somewhat in detail in order to throw light on the purpose which brought about the advance payment. There were present at that conversation Percy Young, the agent of the plaintiff, John Dawson, one of the contractors, and John Burden, the sub-contractor. Mr. Young was desirous to procure a payment on account of the plaintiff's claim of \$2,500 or \$2,700, but Mr. Dawson was unwilling then to pay more than \$1,000 cash, whereupon, says Mr. Young in his testimony: "I asked him if the terms of the contract with Mr. Burden were the same in regard to the payments as the terms of the contract with the board of education, and he said they were, and he stated that the 15 per cent. being held back would preclude his paying us the full amount in cash." Burden, when examined in reference to the same conversation, denied that anything was said about the terms either of his contract with Dawson & Archer or their contract with the board of education, or that anything was said about fifteen per cent being retained under their contract. He did testify, however, that when Mr. Young expressed the opinion that the plaintiff ought to get more money, he, Burden, told Mr. Young that he had no claim on Dawson & Archer for more cash at that time. Dawson, who was also called as a witness, corroborated Burden in the statement that nothing was said about the contracts or retaining fifteen per cent.

Now it is to be noted that the learned trial judge did not believe what Burden and Dawson said on this subject; for he found, in

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the most distinct manner, that the representations alleged in the complaint in regard to the retention of the fifteen per cent were made by Burden and Dawson to the plaintiff's agent on the 10th day of September, 1897. The sole reason, therefore, which the record discloses in support of his conclusion that the advance payment was not made in order to evade the provisions of the Mechanics' Lien Law must be because Dawson swore, in answer to a leading question, that he did not make the payments with the intent of evading those provisions. It does not seem to me that this declaration of intent ought to be allowed to overcome the plain inference to the contrary which is required by the facts actually found at Special Term. It is impossible to perceive what was the purpose of assuring the plaintiff's agent that the fifteen per cent would be retained, unless it was to prevent the plaintiff from then filing a lien which would have reached the \$3,000 that they paid out to Hartmann Bros. on the same day; and no reason whatever is assigned for making that prompt payment to Hartmann Bros., instead of paying the claim of the plaintiff. The payment thereafter to Burden of the fifteen per cent and a little more, left little or nothing in the hands of Dawson & Archer to which the plaintiff's lien could attach, if that advance payment was effective as against the plaintiff; and no reason is suggested why it was made, unless it be the statement of Burden, also in response to a leading question, that he could not have gone on and completed the contract unless he had received the payments which he did receive from Dawson & Archer. The character of this statement may be appreciated when we remember that the witness did not complete the contract at all, and that Dawson & Archer are before the court claiming a credit of upwards of \$800 for having completed it themselves. The accuracy of Burden's account of the transactions must also be considered in the light of his own statement to Young, on September 10, 1898, that he had no claim upon Dawson & Archer for more cash than \$1,000 at that time, when it turns out that they thereafter paid a \$3,000 debt of his to Hartmann Bros. by a check dated the same day.

The case is quite different from *Weisemair v. City of Buffalo* (57 Hun, 48) where it was held that a similar provision for the retention by the city of twenty per cent of the amount due on



the contract did not inure to the benefit of the contractor or his employees, but was inserted for the sole benefit of the city, which alone could claim any rights under it. Here, however, the provision for the retention of the percentage was in the agreement also between the contractor and the sub-contractor, and it would be manifestly unjust to hold that it availed nothing to a materialman having a claim against the sub-contractor for materials furnished, when he had been induced by both parties to the sub-contract to postpone the enforcement of that claim by representations that such percentage would be retained.

The respondents also cite *McMillan v. Seneca Lake Grape & Wine Co.* (5 Hun, 12) and *Cheney v. Troy Hospital Association* (65 N. Y. 282) in support of the proposition that where the contract has been abandoned and the contractor (or in a case like the present, the sub-contractor) has been fully paid for all work done prior to the time the lien is filed, the lien must fail because nothing can thereafter be due the contractor. This rule, however, has no application to a case in which the full payment can be made out only by including in the computation sums not due when paid, which have been paid in advance to evade the provisions of the Mechanics' Lien Law.

There is no question of forfeiture in the case. None was raised in the pleadings, and no attempt to enforce any forfeiture was made by the contractors who elected to go on and finish the uncompleted work of the sub-contractor at his expense. It is not necessary to pass now upon the points raised by the appellant as to the payment of the \$3,000 to Hartmann Bros. being ineffectual because not shown to have been made with Burden's authority. The proof in regard to this payment evidently does not disclose all the facts, and may be supplemented on the new trial which must be ordered on account of the erroneous conclusion reached on the other branch of the case.

All concurred; CULLEN, J., on grounds stated in memorandum; HATCH, J., absent.

CULLEN, J.:

Without expressing any opinion on the question of fact whether the payments were made by defendants Dawson and Archer with

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intent to avoid and defeat the lien of the plaintiff, I concur in reversal on the ground that there is nothing in the evidence to justify charging the \$3,000 paid to Hartmann Bros. as a payment on account of the defendant Burden.

Judgment, so far as appealed from, reversed and new trial granted, costs to abide the final award of costs.

GEORGE A. MILLER, Respondent, v. ERIE RAILROAD COMPANY,  
Appellant.

*Railroad—expert evidence as to the effect of the use of paint upon a push stick—  
what is not an excessive verdict.*

The admission in evidence, upon the trial of an action to recover damages for personal injuries resulting from the alleged negligence of the defendant, a railroad company, of the opinions of experts to the effect that the result of painting a push stick is to obscure defects therein, does not constitute reversible error, even though such evidence was inadmissible, as the experts informed the jury only what the jurors should have known and undoubtedly did know.

In such an action a verdict of \$6,500 for the plaintiff, who, as the result of the accident, had a badly broken jaw which was not only very painful, but would be permanent, disfiguring his face for life, is not excessive.

APPEAL by the defendant, the Erie Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Orange on the 18th day of April, 1898, upon the verdict of a jury for \$6,500, and also from an order entered in said clerk's office on the 9th day of May, 1898, denying the defendant's motion for a new trial made upon the minutes.

This action was brought to recover damages for personal injuries sustained by the plaintiff while a switchman in the employ of the defendant, in consequence of the breaking of a pole, called a push pole, used for the purpose of enabling an engine on one track to push cars upon another track.

*Henry Bacon*, for the appellant.

*William Vanamee* [*Thomas Watts* with him on the brief], for the respondent.

WILLARD BARTLETT, J.:

This case comes before us for the second time, after a second trial, upon which the damages awarded to the plaintiff (\$6,000) were

nearly twice as large as those awarded by the first jury. The facts of the case are sufficiently stated in the opinion on the former appeal. (*Miller v. Erie R. R. Co.*, 21 App. Div. 45.) The trial which now comes up for review seems to have been conducted in accordance with the suggestion in that opinion, that if the defendant was liable at all it was liable for furnishing to its employees a push stick for use in moving cars which was defective and insufficient when originally furnished. The contention in behalf of the defendant was that the utmost care had been taken by its officers, agents and servants, by means of a stringent system of inspection, to secure push sticks of adequate character and strength for the work in which they were to be employed. On the other hand, the plaintiff introduced evidence tending to show that the push stick in question, which caused the injury to the plaintiff, broke by reason of a defect therein which must have been apparent in the timber before it was made into a push stick ; and the theory of the plaintiff's case was that proper inspection of the wood at that time would have demonstrated its unfitness for the use to which the defendant desired to put it. The plaintiff's failure to observe this defect himself was attributed to the fact that the stick had been painted or stained in such a manner that the decayed, dozy or dead-wood spot, as it was termed, had been made nearly the same color as the rest of the stick, so that it became a hard matter to see it. There was thus a conflict in the evidence as to the actual condition of the push stick at the time it was furnished to the employees of the railroad company, and this raised an issue of fact on that branch of the case which the court was bound to submit to the jury.

On the part of the defendant it is earnestly insisted that the accident was really due to the negligent manner in which the plaintiff and his fellow-workmen made use of the push stick at the time when it broke ; but while there was testimony which would have warranted the jury in adopting that view, we do not think that they were bound to adopt it. Indeed, it may fairly be inferred, from the testimony of those who were present at the accident, that there was nothing out of the ordinary course in the manner in which they attempted to move the car to which the stick was applied.

Two rulings as to the admission of evidence are assigned as error. An expert in the examination of different kinds of wood was asked

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what was the effect of the paint upon the push stick, and, over the objection and exception of counsel for the defendant, answered that its effect was practically to cover up any defects that were in the stick. Another expert was asked what would be the effect of the stain or paint upon the wood, and answered: "Well, if you cover over anything you could not see the defect very well with the stain." Whether opinion evidence should properly have been received on this subject or not, the answers did no possible harm, for they only told the jury what the jurors ought to have known, and undoubtedly did know, without the aid of any statements from witnesses. But still another witness was asked: "Can you say whether that is known among wood experts as a good piece of hickory?" The exception to the ruling of the court admitting this question, even if otherwise well taken, avails nothing to the defendant, because the witness did not answer it responsively. What he said was: "It is a very poor piece of timber; anybody would reject it that knew anything about timber. It has a bad spot into it. It is old timber."

Although the amount of the plaintiff's recovery has been so largely increased upon the second trial, we cannot say that the verdict was excessive. The plaintiff's jaw was badly broken; the injury was not only very painful, but its effects will be permanent, disfiguring his face for life. The case is not one in which the court would be justified in reducing the award of damages.

It follows that the judgment and order should be affirmed.

HATCH, J., absent.

Judgment and order unanimously affirmed, with costs.

MARY A. DEAN, as Administratrix, etc., of WILLIAM H. DEAN,  
Deceased, Respondent, v. THE THIRD AVENUE RAILROAD COM-  
PANY, Appellant.

*Negligence — street railroad — passenger killed by falling from the step of a street car — duty of a railroad company toward persons about to board its cars temporarily stopped.*

In an action to recover damages for the death of the plaintiff's intestate occasioned by his falling from a street railroad car, which the evidence on behalf of the plaintiff showed had stopped on a curve because of a wagon in front of it, and was suddenly started while the intestate was attempting to board it, the conductor of the car testified as follows: "I saw the man make for the car and the car in motion. I hollered to him to look out for himself. He got on, his two feet on the step, and his hand slipped off the hand rail, and he fell and his head struck the ground first. I saw him jump on the car while it was in motion as it was passing around the starter's booth."

*Held*, that the judge properly charged the jury, in substance, that liability might be imputed to the railroad company if the conductor, in the exercise of reasonable care, ought to have seen whether or not any one was about to get on the car while it was temporarily stopped by reason of the obstruction in front of it.

APPEAL by the defendant, The Third Avenue Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 14th day of April, 1898, upon the verdict of a jury for \$5,000, and also from an order entered in said clerk's office on the 26th day of April, 1898, denying the defendant's motion for a new trial made upon the minutes.

*Herbert R. Limburger* [*David Calman* and *Henry W. Mayer* with him on the brief], for the appellant.

*William G. Cooke*, for the respondent.

WILLARD BARTLETT, J. :

The plaintiff's intestate, William H. Dean, came to his death as the result of an accident on the defendant's line at the curve thereof in Park Row, in the city of New York, on the afternoon of the 14th day of April, 1897. He was thrown to the ground from the step of a moving car with such force as to inflict injuries from which he died nine days later. According to the testimony introduced in

behalf of the plaintiff, the car had stopped on the curve because there was a wagon in front of it loaded with rolls of paper, which impeded its progress for the time being. While the car was thus stationary, Mr. Dean approached to board it, and had placed one foot on the step, when the car moved on suddenly, and in consequence of such motion he fell off, with the result which has been stated. On the other hand, the evidence in behalf of the defendant tended to show that Mr. Dean attempted to board the car while it was in motion, and that it never came to a stop at all until after the accident. The proof for the plaintiff contains nothing to show that the intention or desire of Mr. Dean to take passage on the car was communicated to the conductor, who was stated by one of the plaintiff's witnesses to have been just going inside the car at the time of the accident; but that the conductor actually did see the plaintiff is shown by his own account of the occurrence as follows: "I remember passing the starter's booth at the time of the accident. I saw the man make for the car and the car in motion. I hollered to him to look out for himself. He got on, his two feet on the step, and his hand slipped off the hand rail, and he fell, and his head struck the ground first. I saw him jump on the car while it was in motion as it was passing around the starter's booth."

Recognizing the rule that a street railway company must give an intending passenger a reasonable time to board a car, counsel for the appellant argue that this rule applies only to regular stopping places or crossings and to cases in which the employees of the defendant have actual notice that there is an intending passenger who is attempting to board the car. In other words, they contend that it was incumbent upon the plaintiff in this case to show that some employee of the defendant had notice of the fact that the decedent desired to board the car.

The learned judge before whom the case was tried took a different view of the law, and instructed the jury, in substance, that liability might be imputed to the defendant if the conductor, in the exercise of reasonable care, ought to have seen whether or not any one was about to get on the car while it was temporarily stopped by reason of the obstruction in front of it. I am strongly inclined to think that he was right. Such seems to have been the view of the obligations of a street railway company, under similar circumstances,

entertained by the General Term of the third department in the case of *Losee v. Watervliet Turnpike & R. R. Co.* (63 Hun, 404). There the plaintiff claimed to have been hurt by the starting of the car in which she was a passenger after she had arisen from her seat to leave the car, and the General Term said: "It was for the jury to say not only whether plaintiff was standing up to change her seat or to leave the car, but also *whether the conductor should have seen her in the absence of any signal*, and whether his act in starting the car when she was standing up was or was not wrongful."

In support of the position of the defendant on this branch of the case we are referred to *Georgia Pacific Railway Co. v. Robinson* (68 Miss. 643), and *Pitcher v. People's Street Railway Co.* (154 Penn. St. 560). In the first case cited the plaintiff succeeded by means of a signal in stopping a steam railway train at night at a point where it was not accustomed to stop, and was in the act of stepping on board when the train suddenly started, severely injuring his knee. The Supreme Court of Mississippi held that he could not recover for the injury if his purpose to take passage was unknown to the conductor and other trainmen. In the Pennsylvania case a street car had stopped to let a passenger pass out from the rear door. The plaintiff's minor son attempted to board the front platform and, as he was about to place his foot upon the step, the car started, throwing him under the wheel. He had given no signal to either the conductor or driver of his purpose to enter the car, and it did not appear that he was seen by either of them. Upon the trial plaintiff was nonsuited and the judgment of nonsuit was affirmed by the Supreme Court. "It was the plain duty of the boy," said Mr. Justice GREEN in this case, "to give some notice of his intent to become a passenger, and until he did so the defendant was not guilty of any negligence in simply not knowing of such intent."

Although I am not prepared to question the correctness of the results reached in these cases in view of the particular facts of each, it seems to me that we can hardly hold that the persons operating street cars in our great cities are not under some obligation to anticipate that intending passengers may get on board or attempt to get on board when the cars are stopped by reason of temporary obstructions or for any other cause, at places where stops are not ordinarily

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made. However this may be, the jury in the present case were authorized to take a view of the facts which would bring it within the rule laid down in Mississippi and Pennsylvania; for the passage which we have quoted from the testimony of the conductor, if believed, shows that he was made aware of Mr. Dean's intention and effort to get on board the car. When a witness says that he saw a man "make for" a car, he means that the man was trying to board the car, if he means anything. The jury may have believed him to this extent, and yet have discredited his statement that the car was in motion at the time.

I think the judgment should be affirmed.

Judgment and order unanimously affirmed, with costs.

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JACOB WORTH, Respondent, v. THE CITY OF BROOKLYN, Appellant.

*City of Brooklyn — expenditures of the county clerk of Kings county in the care of county records are a charge against that city — audit of the claim.*

An expenditure made in July, 1897, by the county clerk of Kings county in arranging papers which were scattered and mixed together by reason of thirty-two large cases in his office falling from their places without fault on his part, being a proper county charge under section 230 of chapter 686 of the Laws of 1892 (the County Law), is, under section 2 of chapter 954 of the Laws of 1895, consolidating the governments of the county of Kings and the city of Brooklyn, a proper charge against the latter.

Where such defense is not set up in the answer or suggested upon the trial of an action brought against the city to enforce such claim, it cannot be successfully argued, on appeal, that before the plaintiff could enforce his claim he was bound to procure authority for its payment from the common council of the city of Brooklyn.

APPEAL by the defendant, The City of Brooklyn, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 2d day of May, 1898, upon the report of a referee.

*Almet F. Jenks* [*Jerome W. Coombs* with him on the brief], for the appellant.

*Hugo Hirsh*, for the respondent.



WILLARD BARTLETT, J. :

The County Law provides that the county clerk shall "have the custody of all books, records, deeds, parchments, maps and papers, deposited in his office in pursuance of law, and attend to their arrangement and preservation." (Laws of 1892, chap. 686, § 161.)

The same statute, in defining what constitute county charges, enumerates "moneys necessarily expended by any county officer in executing the duties of his office in cases in which no specific compensation for such services is provided by law." (Laws of 1892, chap. 686, § 230.)

By the act to consolidate the governments of the county of Kings and the city of Brooklyn, and to regulate the same, it was declared, among other things, that all charges and liabilities then existing against Kings county, or which might thereafter arise or accrue in said city and county, and which, but for that act, would be charges against, or liabilities of, said county, should, from and after the 1st day of January, 1896, for the purpose of the enforcement thereof, be deemed and taken to be charges against, or liabilities of, the city of Brooklyn. (Laws of 1895, chap. 954, § 2.)

On the 21st day of July, 1897, while the plaintiff was county clerk of Kings county, thirty-two large cases in his office fell from their places, and in their fall scattered and mixed thousands of papers therein contained, breaking, tearing and destroying books, records and documents, and thereby, for the time being, greatly impairing the usefulness of the county clerk's office as a place of record for public documents. This occurred, as the referee in the present case has found upon evidence which justifies such finding, without any fault or negligence on the part of the plaintiff. In order to rearrange the papers and to rebind, repair and rearrange the judgment dockets and books damaged by the accident, the plaintiff employed skilled workmen and expert superintendents, and paid out in salaries and other necessary expenses the sum of \$14,800. No question is raised upon this appeal as to the necessity of this expenditure, or the reasonableness of the amount expended. The only question is, whether the plaintiff had authority to incur the liability so as to bind the city to pay it.

The statutes which have been cited conferred upon the county

clerk the power to repair the damage done by the accident at a reasonable expense to the municipality. In so doing he simply discharged his duty under the County Law to attend to the arrangement and preservation of the books, papers and other documents deposited in his office pursuant to law. The expenditure therefor (always assuming it to have been reasonable, as we are bound to do upon the record before us in this case) would have been a county charge against the county of Kings before the county government was consolidated with the government of the city of Brooklyn. By force of the consolidation statute it became a charge against the city. To a charge of this kind, provisions of the city charter in regard to contracts had no application. Under the provisions of the County Law relating to the powers of boards of supervisors, charges against the county are required to be audited annually by the board. (§ 12, subd. 2.) The consolidation statute of 1895, uniting the Kings county and Brooklyn governments, devolved upon the common council of the city all the powers and duties formerly vested in the board of supervisors of Kings county; and it is argued, in behalf of the appellant, that before the plaintiff could enforce his claim he was bound to procure authority for its payment from the common council. No such defense as this was set up in the answer or suggested upon the trial. The city has had the advantage of the expenditure of the money by the plaintiff, and no valid reason in law has been presented on this appeal why it should not repay to him the amount which he has spent for its benefit.

Different questions would arise if there was any suggestion of fraudulent or excessive expenditure in the case, but there is none.

On the evidence we think that the judgment was right, and should be affirmed.

All concurred.

Judgment affirmed, with costs.

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SARAH C. DOUGLASS and GEORGE F. CORNELL, as Executors, etc., of GEORGE L. CORNELL, Deceased, Respondents, v. ANDREW L. BUSH and WILLIAM B. HALSTEAD, as Executors, etc., of NEWBURY D. HALSTEAD, Deceased, and WILLIAM B. HALSTEAD, Individually, Appellants.

*Contempt—judgment enjoining the owner of bathing houses from permitting his patrons to use a private road—removal by him of a fence on his own land, thereby facilitating such use.*

In proceedings for contempt, for a violation of a judgment prohibiting a party from permitting the patrons of his bathing houses to make use of a private road or lane mentioned in the judgment, proof that he removed a fence on his own land, so as to allow such persons to gain convenient access to the private road, justifies a decision adjudging him to be guilty of a contempt of court in willfully permitting a use of the private road which was forbidden by the injunctive portion of the judgment.

APPEAL by the defendants, Andrew L. Bush and William B. Halstead, as executors, etc., of Newbury D. Halstead, deceased, and William B. Halstead, individually, from an order of the Supreme Court; made at the Westchester Special Term and entered in the office of the clerk of the county of Westchester on the 9th day of July, 1898, adjudging the defendant William B. Halstead to be guilty of a contempt of court, and ordering him to pay a fine of \$150, and directing that he stand committed to jail until said fine be paid.

*Frederick W. Sherman*, for the appellants.

*John H. Clapp*, for the respondents.

PER CURIAM:

The facts of this case are sufficiently set forth in the opinion upon a former appeal. (*Douglass v. Halstead*, 11 App. Div. 101.) It was then decided that the proof did not warrant a finding that the defendant Halstead had been guilty of contempt in removing the fences which he did remove, but that the evidence justified the conclusion that he had violated the provision in the judgment which prohibited him from permitting the patrons of his bathing houses to make use of the private road or lane mentioned in the judgment. The proceeding was, therefore, remitted to the Special Term for a

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further hearing on the merits, inasmuch as it did not appear what punishment the court below would have inflicted for the only misconduct which we thought had been proved. Such further hearing has now been had at Special Term upon the same papers, with the result that a fine of \$150 instead of \$200 has been imposed upon the defendant Halstead, who again appeals.

It is argued in his behalf that the only evidence of his having permitted the use of the private road which the injunction forbids shows that the road was invaded *in consequence* of the removal of the fence, which removal the Appellate Division has decided not to have been a violation of the injunction. If he acted within his rights in removing this fence, it is urged that he cannot be held responsible for the consequences.

This argument proceeds upon a misapprehension of our former decision. One provision of the judgment forbade the defendants from pulling down or injuring the fences on the premises of the plaintiffs. We held that the defendant Halstead could not be punished for violating this provision, because it did not appear that the fencing with which he had interfered was on the plaintiffs' land. In other words, he was enjoined from committing a trespass, and the proof failed to establish that he had committed such trespass. As to the part of the judgment, however, which prohibited him from permitting persons visiting or using the bath houses to pass over the private road in question, the case is different. His removal of the fence on his own land, so as to allow such persons to gain convenient access to the private road, though no trespass, was an act indicative of a willingness, not to say desire on his part, that the patrons of the bath houses should pass over that road; just as it would have been if he had opened a previously locked gate in order to let them through. We remain of the opinion that he willfully permitted a use of the private road which was forbidden by the injunctive portion of the judgment, and thereby subjected himself to punishment for contempt.

No objection is made to the form of the order, and it should be affirmed, with ten dollars costs and disbursements.

All concurred.

Order affirmed, with ten dollars costs and disbursements.

FRANK M. MONTIGNANI, Respondent, v. THE E. V. CRANDALL COMPANY and Others, Appellants.

*Conversion of chattels by a sheriff—proof as to its effect on the owner's customers and business—the price on an execution sale is some evidence of value.*

Where personal property has been levied upon by the sheriff, under an execution against a party not the owner, the latter, in an action brought by him for its conversion, is not entitled to testify that there were customers in his store where the property was, who saw it being taken by the sheriff; that he had but a small business and little capital, and that the removal of this part of the stock practically destroyed his business in the articles taken.

The price realized upon a sale of property under an execution is some evidence of its value.

APPEAL by the defendants, The E. V. Crandall Company and others, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 7th day of February, 1898, upon the verdict of a jury, and also from an order entered in said clerk's office on the 29th day of April, 1898, denying the defendant's motion for a new trial made upon the minutes.

*Herman Herst, Jr.* [*Thenford Woodhull* with him on the brief], for the appellants.

*John F. Montignani*, for the respondent.

HATCH, J.:

This action was brought against the sheriff of Kings county for the conversion of personal property. Claim of ownership in the plaintiff having been made when the sheriff levied upon the property, he demanded a bond of indemnity which the defendants gave; thereupon the sheriff took the property, and this action having been brought against him, the defendants were substituted as parties defendant. The evidence warranted the jury in finding that the property was not owned by the defendant in the execution under which the sheriff acted. This would lead to an affirmance of the judgment were it not for the fact that fatal error was committed in rulings upon questions of evidence. The sum which the plaintiff became entitled to recover was measured by the value of the property converted.

Upon this subject the defendants sought to show what the property realized upon the execution sale; objection was interposed; the evidence was rejected, and the defendants excepted. What the property brought at the sale was some evidence of its value, and the defendants were entitled to have the same considered by the jury. (*Bowdish v. Page*, 81 Hun, 170; *Parmenter v. Fitzpatrick*, 135 N. Y. 190.) There was no claim that the sale was not made in the usual way in which such sales are conducted, or that it was in any sense forced or extraordinary; consequently there was nothing to take the case out of the rule of these authorities.

There was also another ruling which presents clear error, assuming that the point was fairly taken. The plaintiff being interrogated about the transaction at his store where the property was seized, was asked, "Q. There were customers in there?" This was objected to; the objection was overruled, the defendants excepted, and the witness answered, "Yes." Then followed the question, "They saw it being taken by the sheriff?" Thereupon the witness proceeded to give testimony showing that he had but a small business and little capital, and that the removal of this part of the stock practically destroyed his business in the articles taken. There is no objection in the record to this part of the testimony, unless it be covered by the general objection above noted, and it can be urged with some force that no question was presented by the objection taken. In no view and for no proper purpose could this testimony be received, either that to which specific objection was made or that which followed, and as the objection was taken and the ruling had when this subject was entered upon, the objection should be held to relate to and embrace the whole. The rulings to which we have adverted were distinctly prejudicial; the first, because it bore directly upon the issue of the value of the property, which was the measure of damage under the issue; the second because its effect was to arouse the animosity of the jury, and prejudice them against the defendants, in consequence of the fact that not only was there a conversion of the property, but that the business of the plaintiff was also ruined, and thereby induce them to enhance the value of the property converted. There is a wide discrepancy between the property claimed by the plaintiff to have been taken and the property which was inventoried by the sheriff at the time of the seizure. There is also a wide difference

in the value placed by the plaintiff upon some of the articles taken, and their value as testified to by witnesses called on behalf of the defendants. The jury have awarded the full amount claimed by the plaintiff as authorized by his testimony; and it may be that this conclusion has been reached by consideration of the testimony to which we have adverted, and in not being permitted to know the price which the property realized upon its sale.

For these reasons the judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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**JOSEPH R. SOLOMONS, Appellant, v. LOUIS L. RUPPERT and ELLEN L. RUPPERT, Respondents.**

*Evidence establishing the partnership relation.*

In an action to procure a dissolution of a partnership and an accounting, it appeared that the plaintiff had entered the employment of the defendant at a salary, with the expectation on the part of both of their ultimately forming a partnership in the business then carried on by the defendant; that the plaintiff subsequently demanded that the defendant should comply with his promise and admit him to partnership, and thereafter renewed his demand that he should have a half interest in the business, to which the defendant replied: "All right, you shall have it on the first of January," the terms of the agreement being that the plaintiff should pay for such half interest \$5,000 in monthly installments, to be deducted from his half of the proceeds of the business. No written articles of copartnership were then prepared, and on the first of January the defendant stated that he had not had time to prepare the articles, but that the partnership could continue from that time, and he would have the articles prepared, which he did in the succeeding April, and submitted them to the plaintiff, who refused to sign them, claiming that they did not embody the whole agreement.

In March of the next year, a lease for ten years of a building in which the business was to be carried on was executed by both the parties as their joint act; and the plaintiff, after the first of January, drew for some three years from the earnings of the business a sum considerably in excess of his previous salary.

*Held*, that the circumstances justified the conclusion that a partnership relation existed between the parties.

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APPEAL by the plaintiff, Joseph R. Solomons, from a judgment of the Supreme Court, in favor of the defendants, bearing date the 7th day of April, 1898, and entered in the office of the clerk of the county of Kings, upon the decision of the court, rendered after a trial at the Kings County Special Term, dismissing the complaint upon the merits.

*George W. Wingate*, for the appellant.

*George D. Beattys*, for the respondents.

HATCH, J. :

This action was brought to procure the dissolution of a copartnership and for an accounting. The issue raised by the pleadings, and litigated upon the trial, was the existence of the copartnership. Upon this issue the court found that some of the testimony indicated the existence of a copartnership, and that the defendant Louis L. Ruppert, who is hereafter referred to as the defendant, promised to take the plaintiff into partnership with him, and at times acted as though such partnership was actually consummated; but that the weight of testimony was against its existence, and, therefore, the complaint was dismissed. We are brought to the conclusion that such finding is against the weight of the testimony, when the undisputed facts are considered in connection with the other testimony and the acts of the parties in connection therewith. It is quite evident that when the plaintiff left his position in New Jersey and entered the employ of the defendant, it was with the expectation of ultimately forming a partnership in the business then carried on by the defendant in Brooklyn. That this was then in the minds of both parties is fairly to be gathered from the testimony, and is supported by the finding of the court. The version of the plaintiff is that he entered the employ of the defendant in May, 1892, at a salary of twenty dollars a week, which was subsequently raised to twenty-five dollars a week. In August, 1893, he demanded that the defendant should comply with his promise and admit him to partnership. In October of the same year, he renewed his demand that he should have a half interest, and the defendant replied: "All right, that I should have it on the first of January, 1894." The terms of this agreement were that plaintiff



should pay for such half interest \$5,000 in monthly installments, to be deducted from plaintiff's half of the proceeds of the business. No written articles of copartnership were then prepared, and on January first, plaintiff asked defendant if he had had the articles prepared; defendant replied that he had not, as he had not had time, but that the partnership could continue from that time and he would have the articles prepared. In April, 1894, the defendant presented to the plaintiff written articles of copartnership, which the plaintiff refused to sign, claiming they did not embody the whole agreement. Upon this point the plaintiff testified that he would not sign, and wanted to consult a lawyer; the defendant replied that he did not see the necessity for this course, "and we would go right along and do business as we had been doing;" that was to divide the proceeds. The defendant denied making this statement, and testified that he said: "If you don't sign those papers, you will never sign any other; there will be no agreement made; what is good enough for me is good enough for you." He further testified that this ended the negotiation for a partnership; that none had been before agreed upon, and none was thereafter consummated. By the terms of the agreement proposed by the defendant, the plaintiff was to have one-half of the dental property mentioned therein for two years and three months from the 2d day of January, 1894, for the sum of \$5,000, payable in twenty-seven payments secured by notes, six of which should be for \$150 each, with interest at six per cent, payable in two, three, four, five and six months from date, and twenty-one notes for \$200 each, with interest, payable monthly, distributed over twenty-seven months, the whole period covering both sets of notes and equalling that of the lease. At the expiration of this time, the property was to be transferred to the plaintiff by bill of sale. The title to the property was to remain in the defendant during the term of the lease. Upon the expiration of this period and the execution of the bill of sale, the defendant would take the plaintiff into partnership. In the meantime the plaintiff was to have one-half of the earnings of the business, but no control of it until the partnership was formed. It is apparent, from the testimony of the plaintiff and this agreement, that the arrangement contemplated the payment of \$5,000 for plaintiff's share in the business; that this sum was to be obtained from

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the proceeds of the business, and that the same was to begin with the beginning of January, 1894. For, while the agreement was not prepared until April of 1894, by its terms it was to take effect upon the 2d day of January, 1894. As the preparation of the agreement was the act of the defendant, it must, we think, be conclusively presumed that the date at which the arrangement was to go into effect was as early as the date mentioned therein, which corresponds with the plaintiff's version in this respect.

The real issue presented for solution was, did the parties agree to become partners on this date? The terms, as then understood by both parties, were practically conclusive upon these points, *i. e.*, the amount of the sum to be paid, the time of payment, and the source from which the money was to be obtained with which to pay. The point in dispute is, did the defendant waive the provision of lease of the property and consent to an immediate partnership beginning in January? It is well settled that a writing is not essential to the validity of an agreement of copartnership, and it may be established by any competent proof. (Coll. Part. § 2; 2 Greenl. Ev. § 481.) The question presented is to be largely determined upon proper construction of the acts of the parties thereafter, and upon undisputed, or at least, undisputable testimony. At the time when the negotiations were had the business was being conducted at 210 South Eighth street. On May 1, 1895, it was moved to 202 of the same street, on the corner, and a lease taken of the whole building under date of March 14, 1895. This lease was executed by both the plaintiff and defendant as their joint act; each furnished a surety for its fulfillment, and each engaged to pay the rent and keep the property in repair. The term was ten years from the 1st day of May, 1895, and the lease contained a clause whereby the lessor agreed not to rent the premises 210 South Eighth street for the business of dentistry. The whole of the provision of the lease shows that the parties thereto took these premises jointly, and for the benefit of the business in which they were engaged, stipulating against possible competition, so far as the lessor could control the same. By this instrument the plaintiff obtained a right which was clearly a property interest in connection with the business carried on in the structure rented, and under it is entitled to have his prop-

erty right protected. Of this right he cannot be divested any more than the defendant can be of his interest.

The complaint avers that the plaintiff is possessed of this leasehold interest in partnership with the defendant, and that it is a valuable property right. It further avers that the defendant has assigned, without the consent of the plaintiff, all of the property connected with this business. While the answers of the defendants deny any interest in the plaintiff, yet the leasehold interest in the plaintiff is established by the undisputed testimony, and as to this interest at least the plaintiff is, as against both defendants, entitled to an accounting, and a sale of the same, even though he be held to have failed in establishing a general interest as a partner in the whole business. The averments of the complaint were sufficient to raise this question, the prayer for relief was broad enough to cover it, and, under the general equitable power of the court, a proper subject was presented for its cognizance. It should have laid hold of this and granted such relief as was proper even though it went no farther. But, aside from this consideration, we think that the lease, in connection with the other proof, is practically conclusive upon the question of a partnership interest in the plaintiff in this business. It is so incredible as to pass belief that the plaintiff should engage himself in a lease, having no other object than the prosecution of this business, for a period of ten years, thereby incurring a liability of \$9,600, if he had no interest therein. If he was a mere employee, then we must consider his act as a pure gratuity. In this aspect his generosity passes the bounds of credulity. His engagement was only from week to week; he might be discharged at the expiration of any week and thereby cease to have any interest in or connection with the business and yet be incumbered with the load of this lease.

The explanation of the defendant, that the plaintiff executed the lease in order to secure living rooms for himself and family, is not satisfactory. There is no such provision in the lease nor any suggestion therein of any such right reserved to the plaintiff. If called upon to make proof, he could not contradict the lease; and if he had no interest in the whole, he had none in a part. He denies that any such arrangement was made, and if it was, it is conceded that it was never carried out. On the contrary, the defendant occupied the

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rooms which it is claimed were reserved for the plaintiff, and under this claim the plaintiff not only received no benefit but only a continuing burden against which the defendant in no wise secures him, and, while conceding his liability, denies him any interest or security. If it be considered that this lease was executed in pursuance of an agreement of partnership, then it is consistent with the plaintiff's version of such agreement and with the act of the defendant in executing the same jointly with the plaintiff and in securing exclusive right for the prosecution of the dental business in that locality.

It also appears by the proof that after January 1, 1894, the plaintiff changed radically his course of conduct in connection with this business. No claim is made that prior to this time he in any manner interfered with the receipts when the defendant was at the office. Afterwards this was of common occurrence and was the occasion of some difficulty. The books, however, show that the plaintiff, while drawing generally about \$50 a week, frequently drew more, and in the aggregate considerable amounts above this sum. At \$50 a week it amounted to \$2,600 yearly. Yet, in 1895, plaintiff drew \$2,914.06, an excess of \$314.06. In 1895 he drew \$3,030.39, an excess of \$430.39. In 1896 he drew \$2,817, an excess of \$217. Thus, for these three years the excess above a salary of \$50 a week was \$961.45. This was done to the knowledge of the defendant. The items appeared upon the books, and the defendant protested against this course. The defendant also testified that the plaintiff did not assert any right to retain this money as a partner; that he asked for an accounting and return of this money; that he did not get it back, or any part of it, and that he still continued him in employ. If we are to accept the defendant's version of this course of business, then we must say that this money was stolen by the plaintiff, and that the defendant, with full knowledge of these peculations, continued in his employ the dishonest employee, did nothing beyond remonstrating with him against his practice, except upon two occasions when he raised his wages. Surely he must have been an especially valuable employee, if we are to accept this version. Such a course of dealing with a dishonest employee is so palpably absurd as to call for the rejection of this view. The claim of the defendant, that he loaned much of the overpayments to the plaintiff, seems to us to be a lame claim. In this view, as to most of the loans, certainly of a

sum approximating to the overpayment, the loans were forced, that is, the plaintiff appropriated the money and then forced the defendant to consider it a loan. This may not be true as to all, but it certainly is as to much of the overpayment.

Dr. Joslyn testified that the defendant told him, in 1895 or 1896, that he had sold plaintiff an interest in the business, "but that he had kept the business end of it in his own hands." Voight testified that the defendant told him, in 1894, that he had taken the plaintiff in as a partner; "that he was a good man there — attentive to his business; he thought he had earned his share in the business." The plaintiff testified that upon one occasion he took some money from the till, and the defendant demanded it, stating that it was agreed that he should handle the money, and that plaintiff ought not to take it when he was there, but should ask for it; after some words and some time had elapsed, the plaintiff returned the money, and then demanded the receipts for that day, which defendant then handed to him. The defendant states that this money was taken, and says that when he demanded its return plaintiff remarked something to the effect that he "thought I had some rights here, but I don't seem to have any show." The defendant did not deny that subsequently he handed over the day's receipts to the plaintiff, although he denied the statements attributed to him by the witnesses as above noted.

The defendant's version of these transactions, and his acts thereunder, are certainly inconsistent, as we have before observed, with the relation of employer and employee. They do, however, fit in with perfect consistency to the relation of a partnership, in which the details of the business and the control of the cash received were left to one, and the mechanical employment which the business required was left to the other. Such relation harmonizes these acts into a dovetail with the statement which the witnesses heretofore quoted say the defendant made to them, and it is also consistent with an insistence that the money should be received by the defendant, and only delivered to plaintiff upon his request.

Another item of proof is found in the statement of receipts made up by the plaintiff between April 6 and June 4, 1894, inclusive. After deducting from the amount received the expenses and the sums received by the plaintiff and the defendant, there remained a balance of \$150.94. Plaintiff testified that the defendant then set

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down this last sum and divided it by two. This is denied by the defendant. It is evident from an inspection of this paper that the division is made in a different hand from the body of the figures on the paper. It is not disputed that the body is in the hand of the plaintiff. Upon the trial the defendant, at the request of the court, set down these figures and made this division. A comparison between these figures and the division upon this paper shows a striking resemblance. We do not say they were made by the same hand, but they may well have been. Upon a new trial this subject may be investigated by those competent to speak.

Finally, we come to the proof found in the proposal made by the plaintiff to the defendant when the break between them came, that he should buy him out, stating that he would sell for \$2,000. Plaintiff testifies that the defendant replied he "could not buy until he looked over his affairs, and that he would want a few days. I told him I would give him three days." Mr. Bidwell, the defendant's witness, testified that defendant said "he had no money to buy any interest." The defendant denied this testimony, claiming that he said in answer to the proposition: "I told him he had nothing to sell. He said, 'You had better consider that.' I said, 'I have nothing to consider.' He said, 'I will give you just three days to consider that.'"

If the statement claimed by the defendant is the true version, it would be quite consistent with the conclusion reached by the court. But as such statement rests upon the defendant's testimony alone, contradicted in substantial particulars by his own witness and by the plaintiff, the clear preponderance would seem to be upon the side of the plaintiff, inasmuch as the defendant admits substantially all of the transactions as given by the plaintiff, only contradicting him in the reply which he claims to have made.

Isolated transactions, testimony and acts like the last, would not suffice to set aside this decision; but where a long series of acts, accompanied by undisputed testimony, tends to support a given claim, rendering the whole consistent and harmonious, and opposed thereto is a theory which renders inharmonious and inconsistent such testimony and acts of the parties making the claim, it may fairly be said that a conclusion in support of the inharmonious theory is against the weight of evidence and the preponderance of the proof, to such an extent as to lead the mind, with reasonable certainty, to

a conclusion that the determination as made is erroneous, and calls for a reversal. (*Foster v. Bookwalter*, 152 N. Y. 166.) Such a case the foregoing discussion tends with reasonable certainty to show. In this discussion we have not overlooked the defendant's claim or his proof, if we have not adverted thereto as fully as we have to the case made by the plaintiff.

It is quite true that while the business was conducted generally under the name of the "Albany Dental Parlors," and the defendant's name was the only one used in connection with the business as constituting the head, and that all bills were made out in his name, all expenses paid by him, and the business, in this branch of it, solely conducted by him, yet this in no wise affects the consistency of the plaintiff's claim. On the contrary, it is quite in harmony with the plaintiff's theory. It was a branch of the business which constituted, to use the expression which Dr. Joslyn put into the mouth of the defendant, keeping "the business end of it in his own hands." All of this testimony tends to establish a division of labor which left the mechanical part with the plaintiff and the business part with the defendant. Indeed, this was a prudent course for the defendant, as the plaintiff was working out his interest, and until that was accomplished the defendant's interest in the property was more or less entire, dependent upon the amount paid in by the plaintiff as a result of his labor. But this is far from being inconsistent with the agreement which the evidence tended with great force to support. There was no answer whatever to the inconsistency in allowing the plaintiff to deal with the funds as he did if a mere employee. The answer suggested in the brief of counsel and urged upon the hearing, was that the defendant was sued for damages and needed the plaintiff as a witness, and, therefore, feared to offend him. When he testified to this he referred to peculations prior thereto, for upon his cross-examination he stated: "At the time I testified to, when he took some money from the drawer, I don't know that suit was pending then that was spoken of by me in my direct examination. The papers were served in 1894; the spring of 1894." Such suit could hardly have influenced his mind if it had no existence. He made no such claim thereafter, and if he had we should not think it sufficient to overcome the proof to which we have already adverted.

There were some inconsistencies in plaintiff's testimony and his

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acts, notably that of seeking employment in New York. But measuring the whole proof we do not think it shakes the main body of the case, which, as we have said, rests mainly upon undisputed proof.

The discussion has already been prolonged beyond reasonable bounds. We conclude from the whole case that the judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment reversed and new trial granted, costs to abide the final award of costs.

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In the Matter of the Judicial Settlement of the Account of MATILDA R. WESCOTT, as Administratrix of the Estate of ADALINE M. WESCOTT, Deceased.

GRACE E. CATTERMOLLE, Appellant; MATILDA R. WESCOTT, as Administratrix, etc., of ADALINE M. WESCOTT, Deceased, Respondent.

*Contract — agreement to make compensation for services by will — evidence establishing a right to such compensation.*

Upon the hearing before the surrogate of a claim made by one sister against the estate of another, evidence was given to the effect that the decedent in her lifetime agreed to compensate the claimant, for her services in caring for and nursing her, with all the property of which she should die possessed, and that all of such property would not be an excessive compensation therefor; that each sister had directed a will to be drawn in favor of the other, but that by mistake each signed the will which had been prepared for the other, and that the mistake was not discovered until after the death of the deceased sister.

*Held*, that while the evidence was susceptible of a construction establishing an intent to give an estate by will, which intent had failed of execution, it was also sufficient upon which to find an agreement to compensate for services quite independent of the intention to give the estate, and that the decree of the surrogate allowing the claimant the entire surplus of the decedent's estate in satisfaction of her claim was proper.

APPEAL by Grace E. Cattermole, a party to the above-entitled proceeding and one of the next of kin of the above-named deceased, from a decree of the Surrogate's Court of Dutchess county, entered in said Surrogate's Court on the 12th day of March, 1898, settling



the accounts of Matilda R. Wescott, as administratrix, etc., of Adaline M. Wescott, deceased, allowing to the said administratrix the entire amount of the decedent's estate, after the payment of debts, funeral expenses and the expenses of administration, in satisfaction of her claim.

*Edgar M. Doughty* [*Samuel A. Davis* with him on the brief],  
for the appellant.

*George Wood*, for the respondent.

HATCH, J. :

Matilda R. Wescott is the sister of the deceased, and both resided with their father until six years prior to the death of Adaline, when the father died, and thereafter the sisters lived together. The testimony satisfactorily establishes that Adaline was an invalid, suffering from consumption, from the effects of which she died. During the six years prior to Adaline's death Matilda cared for and nursed her. It is evident that, as Adaline slowly approached her dissolution, the care and nursing of her became more burdensome, and the services rendered more constant and exacting. There is no dispute but that the service, care and nursing were rendered with fidelity covering the whole period. Adaline recognized the obligation to Matilda, and the evidence is convincing that she agreed to compensate her therefor to the value of her estate.

Upon the proof, if the allowance had been made to Matilda, based upon *quantum meruit*, it would not have been excessive to have allowed her therefor the full amount left by Adaline. The learned surrogate, however, based his decision upon the existence of a contract between Adaline and her sister, whereby, in consideration of the care and nursing by Matilda, Adaline agreed to compensate her with all the property of which she should die possessed. The conclusion of the learned surrogate has support in the testimony. It appeared that each sister intended to make a will in favor of the other. These wills were prepared, but, by mistake, one became substituted for the other. Adaline executed Matilda's will, and Matilda executed Adaline's. This mistake was not discovered until after the death of Adaline. It was testified by Mr. Anthony, who prepared these wills, that his recollection was that Adaline stated

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that if she outlived Matilda, she would need Matilda's property for her support, and, if Matilda outlived her, she would deserve Adaline's share of the property for the care she had taken and would take of Adaline. Mrs. Stevens, a half sister, testified that Adaline told her "that they had agreed that her sister Matilda was to take care of her as long as she lived, and she was to have whatever money of hers that was left for pay for taking care of her. She told me that three or four times. I can't give the dates, but I think it was in June before her death." The witness further testified that Adaline told her about the will, and also of the agreement to pay for the care and nursing. Lizzie Hoyt, an aunt, testified that Adaline stated to her, "when I am done with what I have, I want my estate to go to Tillie for what she is doing for me. \* \* \* I have agreed to give Tillie all of my estate for the care she has taken of me, and I haven't half enough to pay her for that." While it is, doubtless, true that the evidence is susceptible of a construction of intent to give an estate to Matilda, and that such intent failed in execution, it is equally true that it is also sufficient upon which to find an agreement to compensate for service quite independent of an intent to give the estate. Such contract is valid and capable of enforcement. (*Robinson v. Raynor*, 28 N. Y. 494; *Boughton v. Flint*, 74 id. 476.) Neither does it fail where the compensation was to be made through the medium of a will and none was ever executed. (*Shakespeare v. Markham*, 10 Hun, 311; *Parsell v. Stryker*, 41 N. Y. 480.) A conveyance of the property in direct contravention of the agreement will not suffice to defeat the right, where the case clearly discloses the existence of an agreement to compensate, and service is rendered pursuant thereto. (*Erwin v. Erwin*, 44 N. Y. St. Repr. 6; S. C., 139 N. Y. 616.)

In the present case, the contract being established, the claimant became entitled to an allowance of the agreed compensation. This is accomplished by the decree, which should be affirmed, with costs to the respondent.

All concurred.

Decree of the surrogate affirmed, with costs to the respondent.

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WILLIAM J. FITZPATRICK, Respondent, v. CHARLES H. MOSES and  
Others, Defendants.

FRANK H. PARSONS, the Receiver of WILLIAM J. FITZPATRICK,  
Appellant.

*Receiver appointed in supplementary proceedings — his rights as against an assignee of the debtor — his substitution in a pending litigation — rights of the attorney in such suit.*

Subdivision 4 of section 2469 of the Code of Civil Procedure, providing that that section does not affect the title of a purchaser in good faith, without notice and for a valuable consideration, or the payment of a debt in good faith and without notice, only applies to a purchase or payment made prior to the filing of the order appointing a receiver, and the title of the receiver to claims upon which the judgment debtor has brought suit is superior to that of an assignee of the judgment debtor under an assignment made subsequent to the filing of the order appointing the receiver.

*Seemle*, that in such a case the granting of an order substituting the receiver as the party plaintiff, in place of the judgment debtor, rests in the discretion of the court, and that where the interest of the receiver is small, as compared with that of other parties interested in the litigation, or other facts appear, upon which the court can exercise a legal discretion and refuse the relief, an appellate court will not interfere with its decision.

If the order of substitution be granted it should provide for the protection of such rights as the attorney for the plaintiff may have, and such attorney should be permitted to actively continue in the litigation if he so elects, in order that he may care for his interests therein.

APPEAL by Frank H. Parsons, the receiver of William J. Fitzpatrick, appointed in proceedings supplementary to execution, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the clerk of the county of Kings on the 14th day of October, 1898, denying his motion to be substituted in the place and stead of William J. Fitzpatrick, as plaintiff in this action.

*Edward P. Lyon*, for the receiver, appellant.

*William P. Pickett*, for the plaintiff, respondent.

HATCH, J. :

By the provisions of section 2463 of the Code of Civil Procedure, title to the property of a judgment debtor becomes vested

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in a receiver who duly qualifies, immediately upon the filing of the order appointing such receiver. (*McCorkle v. Herrman*, 117 N. Y. 297.) The exceptions to this provision of the Code are not applicable to the present case. When the title to the property has vested as prescribed in this section, it relates back to the service of the order for the examination of the judgment debtor by virtue of the following section — 2469. The only exception at all pertinent to the present question is found in subdivision 4 of the last section, which provides that this section does not affect the title of a purchaser in good faith, without notice and for a valuable consideration, or the payment of a debt in good faith and without notice. This section does not create any limitation upon section 2468, as, by the provisions of that section, the title absolutely vests upon the filing of the order, when the receiver has qualified. The protection afforded to a *bona fide* purchaser, or the payee of a debt in good faith, has reference to a purchase or payment prior to the appointment of the receiver. (*Matter of Clover*, 8 App. Div. 556.) This was also the rule under the former chancery practice. (*Storm v. Waddell*, 2 Sandf. Ch. 494.) In no event, can any rule furnished by the aforementioned section of the Code find application favorable to the assignee of the claims in suit, from the plaintiff in the action, as the claims were not assigned prior to the filing of the order appointing the receiver. It is clear, therefore, that the receiver, as he has duly qualified, is vested with the legal title to the claims in suit, and is entitled to reduce the same to his possession and control. Being so legally entitled, he ought to be placed in a position where he may protect his rights to the fullest extent. As the law imposes a duty upon him of vigilance in securing and protecting the property of the judgment debtor, for the benefit of the judgment creditor, courts ought to place him in a position where he may best discharge such duty, when they have the legal right so to do, especially where no superior or equal lienor makes a claim.

It seems to us, therefore, that the application for substitution was proper and even necessary for the protection of the right represented by the receiver. Authority for such course is found in section 756 of the Code of Civil Procedure. It is said, however, that the granting of such order is discretionary with the court, and as the court below denied the motion, in the exercise of dis-

cretion, this court will not interfere. It is true that the granting of the order is discretionary; and where the court can see that the interest of the receiver is small as compared with that of other parties interested in the litigation, or other facts appear upon which the court can exercise a legal discretion and refuse the relief, courts, upon appeal, will not interfere. (*Shaped Seamless Stocking Co. v. Snow, Church & Co.*, 20 Misc. Rep. 319.)

In the present case, however, the court did not exercise its discretion. The determination went upon the ground that the legal right of the assignee was superior to the title of the receiver. This, as we have seen, was a mistake of law, and in no sense the exercise of discretionary power. The fact that the assignee is not a party to the action creates no obstacle. The right of the receiver is to have whatever interest was in the judgment debtor at the time of his appointment, and in this litigation the receiver simply takes the judgment debtor's place. This in no wise affects the legal rights of the assignee. She is not estopped or affected by the terms of the order of substitution, and can at any time assert any legal right of which she is possessed. The order of substitution of the receiver, however, should provide for the protection of such rights as the attorney for the plaintiff may have, and he should be permitted to actively continue in the litigation, if he so elects, that he may care for his interest therein.

• The order should be reversed and the motion for substitution should be granted.

All concurred.

Order reversed, with ten dollars costs and disbursements, and motion for substitution granted.

JENNIE L. CHATTERTON, Appellant, v. NELLIE MAR CHATTERTON, Individually and as Executrix, etc., of NATHAN G. CHATTERTON, Deceased, Respondent, Impleaded with Others.

*Reargument* — a failure to discuss in the prevailing opinion a question discussed in the dissenting opinion — who cannot take advantage of it.

The fact that a prevailing opinion of the Appellate Division, delivered on the determination of an appeal from a judgment sustaining a demurrer interposed by one of the defendants in an action, fails to discuss a question relating to the status of another non-demurring defendant, which question was considered in the dissenting opinion of that court, does not show that the question was overlooked; and if it were, the point would not be available to the demurring defendant upon a motion by her for a reargument, or for leave to appeal to the Court of Appeals.

MOTION by the defendant, Nellie Mar Chatterton, individually and as executrix, etc., of Nathan G. Chatterton, deceased, for a reargument of an appeal by the plaintiff, Jennie L. Chatterton, from an interlocutory judgment of the Supreme Court in favor of the defendant, Nellie Mar Chatterton, individually, and as executrix, etc., of Nathan G. Chatterton, deceased, sustaining the said defendant's demurrer to the plaintiff's complaint; or, in the alternative, for leave to appeal to the Court of Appeals, the question to be certified by the Appellate Division.

The opinions written on the appeal are reported in 32 Appellate Division, at page 633.

*Fred E. Ackerman*, for the appellant.

*Safford A. Crummey*, for the respondent.

HATCH, J.:

The motion for a reargument should be denied. The main question for reargument presented by the moving party relates to the failure of the court to discuss the status of the defendant, the Poughkeepsie Savings Bank, in respect of the cause of action set forth in the complaint. If the prevailing opinion were in error upon this point, it would furnish no ground for a reargument. In fact it clearly appeared that the point was considered by the court, as it was referred to in the dissenting opinion of the presiding jus-

tice. It is evident, therefore, that the question was not overlooked, and under the authority of *Mount v. Mitchell* (32 N. Y. 702) no ground for a reargument appears in this regard. The omission of the prevailing opinion to discuss this question does not affect it, nor does it show that the point was necessarily overlooked. (*Fosdick v. Town of Hempstead*, 126 N. Y. 651.) If it were otherwise the point would not be available to the demurring defendant. The Poughkeepsie Savings Bank does not demur to the complaint, and so far as the demurring defendant is concerned, the complaint states a good cause of action. It was clearly within the power and right of the plaintiff to make all persons claiming or having any interest in the property affected by the action, whether as lienors or otherwise, parties thereto, in order that their rights might be determined, and they have their day in court to assert their claims. The Poughkeepsie Savings Bank acquires its lien by virtue of the power of sale contained in the will which is sought to be made the subject of construction. As we view the case, therefore, its rights in the premises arise out of the transaction which is the subject of the action; and we see no reason why a motion for a reargument should be granted, or why leave to appeal to the Court of Appeals should be given. (*Cromwell v. Clement*, 89 Hun, 603.)

The motion should be denied.

All concurred.

Motion for reargument or for leave to appeal to the Court of Appeals denied.

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62	518

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MARIE WOODBURN, Respondent, v. CORNELIUS HYATT, Appellant.

*Injunction depending on the nature of the action—it cannot be granted on an affidavit.*

A motion for an injunction in a case where the right thereto depends upon the nature of the action must be based upon a complaint, and it cannot properly be granted upon an affidavit stating facts which, if properly set forth in a complaint, might be sufficient to support the order.

APPEAL by the defendant, Cornelius Hyatt, from an order of the Supreme Court, made at the Queens County Special Term and

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entered in the office of the clerk of the county of Queens on the 12th day of May, 1898, continuing a preliminary injunction theretofore granted pending the determination of the action.

*Henry A. Monfort*, for the appellant.

*Clinton T. Roe*, for the respondent.

PER CURIAM:

The affidavit upon which the injunction order was granted clearly shows that the right thereto is dependent upon the nature of the action. Indeed, the sole purpose of the action is to procure an injunction restraining the defendant from violating the covenant contained in the respective deeds. It is, therefore, an action where the right to an injunction depends upon the nature of the case, and by virtue of the provisions of section 603 of the Code of Civil Procedure, an injunction can only issue where it appears from the complaint that the plaintiff is entitled to a judgment restraining the acts of the defendant from which he would suffer injury during the pendency of the action. Such is the plain language of the Code, and also of the authorities construing the same. (*Sanders v. Ader*, 26 App. Div. 176; *Heine v. Rohner*, 29 id. 239.)

A case cannot be presented by a complaint where there is no complaint. This injunction was granted upon an affidavit, and while it is true that if the facts therein were properly set forth in a complaint they might be held sufficient to support the order which was made, yet the court cannot construe the affidavit into a complaint, and a complaint the Code requires. Section 607 of the Code has reference to an action where an injunction may be granted, not necessarily dependent upon the nature of the action. (*Cushing v. Ruslander*, 49 Hun, 19.) In such a case the injunction may issue upon an affidavit showing a proper case, and may accompany the summons. (Code Civ. Proc. § 608.)

The order is, therefore, without authority, and should be reversed.

All concurred.

Order reversed, with ten dollars costs and disbursements, and injunction vacated.



CHARLES DEVINE, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD COMPANY, Appellant.

*Negligence — collision between an electric car and a wagon upon the tracks ahead of the car — failure of the motorman to give timely warning, and of the driver of the wagon to look back.*

In an action against a railroad company to recover damages for personal injuries caused by one of the defendant's electric cars running into the rear of a wagon driven by the plaintiff upon the defendant's tracks, a charge by the court that the plaintiff "had the right to assume that they (the railroad company) would give him timely warning of its approach — the motorman," is improper, as no absolute duty to give warning under all circumstances is imposed upon the company.

Whether in such a case the company was guilty of negligence in not giving timely warning, and whether the plaintiff was guilty of contributory negligence in not looking backwards to discover the approach of the car, are questions of fact for the jury to determine under all the circumstances of the case.

APPEAL by the defendant, The Brooklyn Heights Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 5th day of April, 1898, upon the verdict of a jury for \$20,000, and also from an order entered in said clerk's office on the 22d day of April, 1898, denying the defendant's motion for a new trial made upon the minutes.

*John L. Wells*, for the appellant.

*S. D. Morris*, for the respondent.

WOODWARD, J. :

The plaintiff in this action was injured in a collision between a car operated by the defendant and a wagon driven by the plaintiff in one of the streets of the borough of Brooklyn. The accident occurred on the 19th day of December, 1896, at six-twenty p. m., at a point between Seventy-seventh and Seventy-eighth streets, on Third avenue. The plaintiff was driving on the avenue, using the tracks of the defendant. There was evidence to show that the night was dark, and that the highway was not well lighted. The plaintiff had been driving on the tracks of the defendant for a considerable

distance and had, on one or more occasions, turned out, on a signal from the motorman, to allow cars to pass.

At the time of the accident it appears that he had not been keeping watch behind him, and the first intimation which he had of the approach of the car was given him by his son, who, looking around and seeing the car within a few feet, called attention to the fact. Before the plaintiff could get clear of the tracks his wagon was struck, and he was thrown to the ground, receiving the injuries complained of. The motorman testified that he did not see the wagon ahead of him on the tracks until he was within twenty-five feet of the wagon, when he applied the brake, but was unable to stop the car until the collision, although it was running at a speed of about six miles per hour. It was in evidence that the car was running down a grade of something over two feet in one hundred, and the motorman testified that he could stop the car at the point of the collision in about the length of the car.

The case was submitted to the jury upon the question of negligence on the part of the defendant, and contributory negligence on the part of the plaintiff, the court correctly stating the rule of law applicable to the case in the general charge. The error in the case appears in the statement of law made by plaintiff's counsel and acquiesced in by the court, on a request by the defendant to charge "that the plaintiff had no right to suppose or presume that the car would come up and stop before it reached him." This the court charged. Plaintiff's counsel then suggested that "he had the right to assume that they would give him timely warning of its approach — the motorman." To this the court replied, "I have so charged," thus giving the jury to understand that if the defendant had failed to give "timely warning" the plaintiff was absolved from all contributory negligence.

This is not the law. While it was the duty of the motorman to give timely warning if he saw the wagon, or if he might, in the exercise of reasonable care, have seen the wagon in time to have given such warning, he was not bound to do so under all circumstances; and it was for the jury to determine, under all the circumstances of this case, whether the motorman had discharged his duty, and whether the plaintiff had been free from contributory neg-

ligence. The defendant did not have the absolute right to the use of the tracks; the plaintiff might lawfully drive upon them; but the defendant did have the paramount right, and the plaintiff could not drive upon the tracks of the defendant and impose upon it the absolute duty of giving timely warning of the approach of the car. The plaintiff was charged with the duty of exercising reasonable care while using the tracks of the defendant to guard against collision. He could not depend upon the motorman to give timely warning; he was bound to exercise that degree of care which reasonably prudent persons should or would have exercised under the same conditions, and if he failed in this regard he was not entitled to recover damages under the law. He could not enter upon the tracks of the defendant and, closing his eyes to his surroundings, await the timely warning of the defendant's motorman.

"He is bound," say the court in the case of *Adolph v. Cen. Park, N. & E. River R. R. Co.* (76 N. Y. 530, 537), "to keep out of the way when the need, under such circumstances, arises that he should. Hence, there is upon him the duty of learning, when the need has arisen or is likely to arise; and as it is a duty actively to be performed he is bound to use all the ordinary means of learning; and all his natural senses are surely a part of those means, and to be used in such way as that they will bring information to him, so that he may not wait to hear a signal of the approach of a car, but he must at intervals look backward for it. He is enjoying a right liable to frequent interruption. It is a condition of his enjoyment of it that he make no needless delay. He should use his senses to effect that result." This rule is sustained by the court in the case of *Davenport v. Brooklyn City R. R. Co.* (100 N. Y. 632) and in *McClain v. Brooklyn City R. R. Co.* (116 id. 459, 465). Indeed, it is the only rule of law consistent with justice under the circumstances of this case. In quoting the language of the opinion of Judge FOLGER in *Adolph v. Cen. Park, N. & E. River R. R. Co.* (*supra*) we do not wish to be understood to have overlooked the limitations placed upon the doctrine there laid down by the cases of *Fleckenstein v. Dry Dock, etc., R. R. Co.* (105 N. Y. 655) and *Fishbach v. Steinway Ry. Co.* (11 App. Div. 152); nor do we wish to decide that, as a matter of law, it is negligence for the driver to fail to turn and look backwards to discover the approach

of a car from the rear. But it is a question of fact for the jury whether, under the circumstances of the case, such precaution was necessary.

The jury are to determine, as a question of fact, whether, under all the circumstances, the defendant was guilty of negligence in not giving timely warning, and it is equally a question for the jury whether the plaintiff has been guilty of contributory negligence, and this question is entirely out of the control of the jury, if, as a matter of law, the plaintiff had a right to rely upon the defendant giving him timely warning that it desired the use of the tracks. If the night was dark and the highway poorly lighted, so that the defendant's motorman, in the exercise of reasonable care, could not have seen the wagon of the plaintiff in time to prevent the accident, he was not bound, as a matter of law, to give such warning. On the other hand, if the plaintiff, lawfully using the tracks of the defendant, subject to its paramount right, could, by the exercise of reasonable care, have discovered the approaching car in time to have left the track before the car reached him, it was his duty to do so; and, in the absence of evidence tending to show such reasonable care, the jury would have been justified in finding that the plaintiff had not been free from contributory negligence, which is necessary to maintain this action. It was, therefore, error for the trial court to leave the jury with the understanding that the defendant owed the plaintiff the absolute duty of giving timely warning of the approach of the car.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

34	252
165	609
34	252
60	681

NORMAN HUBBARD, Respondent, v. HENRY T. CHAPMAN, JR.,  
Appellant.

*Contract of sale providing for a test to be made by a person named — agreement that the test should be made by another — proof of such agreement by the vendor under a complaint alleging performance.*

A director of a corporation, by a contract, to which the corporation was not a party, agreed to pay for a stamping mill to be furnished to the corporation, in case the mill should prove satisfactory. The contract provided, "It is agreed that the test of the mill shall be made by E. P. Jones." Jones, who was an employee of the corporation at the time the contract was made, having been dismissed from its employ before the test was made, the test was, by agreement between the parties interested in the contract, made by one James Smith and pronounced satisfactory, but notwithstanding this the director refused to pay the purchase price.

In an action brought to recover from the director the purchase price of the mill, *Held*, that the plaintiff was entitled to recover ;

That the agreement that the test should be made by Jones did not impose a duty upon the vendor, but was a concession on his part to the vendee, upon whom the burden was imposed of having such test made ; that it was not a condition precedent to be established as a part of his agreement by the vendor, and, hence, the fact that the plaintiff had alleged performance of the contract did not preclude him from showing that the vendee, who had undertaken this part of the contract, had failed in its performance, and that another person had been substituted for Mr. Jones to make the test.

APPEAL by the defendant, Henry T. Chapman, Jr., from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 8th day of February, 1898, upon the verdict of a jury rendered by direction of the court.

The action was brought to recover the price of a stamp mill furnished to the Gold Bullion Mining Company pursuant to a contract between the defendant and John W. Marshall, the terms of which are set out in the opinion. The complaint alleged that the plaintiff built the mill referred to in said agreement, and that, at the time of making said agreement, John W. Marshall was indebted to the plaintiff for the reasonable value of such mill, and that the plaintiff, relying upon the said agreement, parted with the possession of said mill. It also alleged that, prior to the commencement of the action, John

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W. Marshall assigned to the present plaintiff all his right, title and interest under said agreement.

*Herbert T. Ketcham*, for the appellant.

*Joseph A. Burr*, for the respondent.

WOODWARD, J. :

The plaintiff in this action constructed for one John W. Marshall a mill for crushing ores, called the Marshall Pneumatic Stamping Mill, and in the early winter of 1893 this mill was in the factory of the plaintiff. About the 28th day of February, 1893, the said Marshall entered into an agreement with the defendant in which it was provided that "John W. Marshall agrees to deliver the 'Marshall Pneumatic Stamp Mill,' now at Norman Hubbard's Works, 93 Pearl street, Brooklyn, aside car or steamer F. O. B." and "Henry T. Chapman, Jr., agrees to forward said mill to the Gold Bullion Mines, located near town of Clifton, Arizona, and to erect same thereon as expeditely as possible under supervision of E. P. Jones, all without expense to said Marshall." It was also "agreed and understood that the Gold Bullion Mining Co. are to have the privilege of running this mill thirty days, and same working satisfactorily the said Chapman is to pay Norman Hubbard, of 93 Pearl street, Brooklyn, the sum of twenty-five hundred dollars (\$2,500) for this mill; unsatisfactorily, the Mining Company are to box and deliver the mill at the railroad station at Clifton, subject to the order of J. W. Marshall. It is agreed that the test of the mill shall be made by E. P. Jones."

The answer puts most of the allegations of the complaint in issue, but the defendant offered no evidence at the trial, relying upon a question of law. At the close of the plaintiff's case defendant's counsel moved to dismiss the complaint on the ground that "it alleges that a contract under which the defendant bound himself to pay for the mill in the event that it worked satisfactorily under a test to be made by Jones, and that the proof had failed in that respect." Defendant's counsel also asked that a verdict for the defendant be directed upon the same grounds. Both of these motions were denied, and the defendant excepted to the denial of

the first motion. On motion of the plaintiff a verdict for the plaintiff was directed, and from the judgment entered thereon appeal comes to this department.

It was established on the part of the plaintiff that John W. Marshall delivered the mill in question as provided in the contract or memorandum of agreement; that it was shipped to Clifton, Arizona; that it was taken to the mines of the Gold Bullion Mining Company and erected under the supervision of E. P. Jones; that it was operated successfully for a period of thirty days after having been in the possession of the Gold Bullion Mining Company for more than one year, but it was not shown that the test was made by the said E. P. Jones, he having been dismissed from the employ of the company before the test was made, and pursuant to an agreement between the defendant and the plaintiff one James Smith was sent to Arizona and the test was made under his supervision and pronounced satisfactory. This test was made in the summer of 1894, and the mill was retained by the Gold Bullion Mining Company until the summer of 1895, when it was seized and sold by the sheriff to satisfy certain claims of creditors. The defendant now seeks to avoid payment upon the ground that the test was not made under the supervision of Mr. Jones, such test being, as he contends, a condition precedent to the right of the plaintiff to recover.

This question was practically disposed of in the case of *Krakauer v. Chapman* (16 App. Div. 115), the defendant being the same as in the case at bar. In that case the defendant had authorized certain parties to ship goods to the Gold Bullion Mining Company assuring them that E. P. Jones (evidently the same party involved in this transaction) was authorized to draw on him at thirty days' sight for the amount of the bill. The parties, who resided in Texas, were not able to fill the order at once, but sent a portion of the goods. Mr. Jones drew a draft upon the defendant at thirty days for \$500, which draft was duly paid. In the meantime Mr. Jones left the employ of the Gold Bullion Mining Company, and when the remainder of the goods arrived Mr. Jones had no authority to draw a second draft, or, if he had, he was out of the reach of the plaintiff. Under these circumstances the defendant undertook to avoid payment on the ground that Mr. Jones, in the drawing of the draft for \$500, had exhausted the authority, although the letter of

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credit assured the parties shipping the goods that Mr. Jones was authorized "to draw on me for the amount of your bill," and the bill aggregated something over \$1,000. Mr. Justice HATCH, writing the opinion of the court in that case, said: "The purpose of this letter was to authorize the plaintiffs to deliver goods to Jones upon the credit of the defendant, and the latter prescribed a particular method of payment. This condition presupposed that Jones would draw the draft when the goods were delivered. If Jones had died before he was able to draw a draft, it would not be contended that the plaintiffs must lose the purchase price of the goods. When Jones left the employment of the company he was beyond the reach of the plaintiffs and they were unable to obtain any other draft. They did all that was left for them to do, notified the defendant and requested payment of him. It may be conceded that if Jones had continued to occupy the relation which he occupied when the goods were delivered, the defendant might insist that he was only liable to pay Jones' draft for the goods. But when that became an impossible or an impracticable condition, which neither party had the power or opportunity to produce, and the defendant was notified of it, we do not think that he could insist upon strict compliance in that respect and thereby destroy his liability. As the purpose of the instrument was to procure the delivery of the goods, and such purpose was accomplished, liability attached to pay in the manner prescribed if that were practicable and could be accomplished, if not, then to pay in some other manner. We think it must be held that the defendant contemplated the continued existence of Jones in such capacity as would enable him to draw for the goods, and, as this contingency failed, the particular method of payment failed, and the defendant became liable to pay for the goods, and could not thereafter insist that he was only liable to pay upon a draft drawn by Jones."

The reasoning is equally applicable to the case at bar. The object of the agreement between the defendant and Marshall was to procure the mill in question upon the credit of the defendant. Marshall performed his part of the agreement in delivering the mill at the point of shipment, and the liability of the defendant attached at the time of shipment. It is true that this liability was contingent upon the mill passing a satisfactory test, but the defendant having



appropriated the property to the uses of the company in which he was a director, and having elected, with the consent of the plaintiff, to submit the test to another, he cannot now be heard to deny his liability for the amount of the purchase price. The plaintiff was not responsible for the discharge of Mr. Jones, and the defendant could not, by his own act, defeat the right of the plaintiff to compensation for the value of the property. John W. Marshall, to whose rights the plaintiff succeeds, had performed all of the conditions of his contract. It was the duty of the defendant, after a test had been made, to reship the mill if it was not satisfactory, and, having neglected to comply with this condition of the contract, and the mill having passed out of the control of the plaintiff, it would not be consistent with justice to say that the defendant may be relieved from the obligation of his contract because Mr. Jones did not make the test of the mill.

The clause of the contract relied upon by the defendant is not a condition precedent to the liability of the defendant, but is a mutual agreement between the parties that the test may be made by a certain party. The real question was whether the mill should prove satisfactory; upon this point hinged the ultimate liability of the defendant, and the question of who should make the test was merely an incident. The defendant having elected to retain control of the mill after a test, he cannot now escape the duty which he owes to this plaintiff by urging a lack of specific performance of an incidental clause in the agreement, which he had himself made impossible of performance. No duty rested upon John W. Marshall or this plaintiff. The agreement was that "the Gold Bullion Mining Co. are to have the privilege of running this Mill thirty days, and same working satisfactorily the said Chapman is to pay," etc. It was beyond the control of the plaintiff, and the agreement is to be understood merely as a concession on the part of the plaintiff that the test might be made by Mr. Jones, though the question of what particular individual might make a test which would be satisfactory to the Gold Bullion Mining Company and the defendant was not material to the question of liability.

The particular point urged by the defendant, that the plaintiff having pleaded performance, the admission of evidence, when properly objected to, of a waiver of performance, is inadmissible, would

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be controlling, no doubt, if this question was really involved, but it is not. The Code of Civil Procedure (§ 533) provides that "In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions *on his part*. If that allegation is controverted, he must, on the trial, establish performance." The plaintiff did allege performance of all the conditions on his part, and this was put in issue by the answer, and the burden of proving performance was thus placed upon the plaintiff. This did not, however, place the burden upon the plaintiff of showing that the agreements of the defendant had been kept; he had fully met all the requirements of the Code when he had established that he had done and performed all of the conditions on his part. The covenant or agreement in the contract between John W. Marshall and the defendant in reference to Mr. Jones, was the covenant or agreement of the defendant. Mr. Jones was in his employ; the defendant alone was in a position to say that "the test of the Mill shall be made by E. P. Jones," because Mr. Jones was alone subject to his orders, and it cannot be assumed that Mr. Marshall would make this condition for himself, knowing that Mr. Jones was in the control of the defendant. It is evident from the testimony of the plaintiff that this was the understanding of the parties, for he testifies that "He (defendant) wanted to know if we would not allow somebody to go down in Arizona and run the mill. I was with Mr. Chapman. I told him I would not accept anybody as I sent it down at a risk myself, unless it was somebody satisfactory to me who would do justice to the mill." This indicates clearly that the plaintiff had accepted Mr. Jones as a competent person to make the test upon the pledge of the defendant that Mr. Jones should make the test, and it was clearly competent for the plaintiff to introduce evidence of the history of the transaction, showing the relations of the parties. It was not necessary for him to establish that Mr. Jones made the test; this was no part of his agreement. The defendant had undertaken this part of the contract, and the plaintiff had a right to show that he had failed in the performance; that the defendant had put it out of his power to have Mr. Jones make the test, and that another person

had been substituted at the request of the defendant. If Mr. Jones had died before the time arrived for testing the machines, no one would think of asserting that the rights of the plaintiff were affected; and the case is not altered when the defendant has discharged the man whom he has stipulated shall make the test, thus preventing the carrying out of his part of the agreement; and no interest of the defendant is sacrificed by the introduction of the testimony in reference to the failure on the part of the defendant to carry out his contract with the plaintiff. The objection is based upon the assumption that the test by Mr. Jones is a condition precedent, and that this is one of the covenants of the plaintiff. As we have seen, this is a mistaken construction of the agreement, and objections based upon a false assumption cannot avail the defendant on appeal. The evidence shows that the plaintiff had performed all of the conditions on his part; that the defendant had not only gained possession of his property without compensation, but had put himself in a situation where he could not comply with the conditions of his contract. There was no evidence offered to controvert the case thus made by the plaintiff, and the question presented is purely one of law, in which the contention of the defendant cannot be sustained.

The cases relied upon by the defendant are not in point, for they deal with an entirely different state of facts, where the plaintiff has, in fact, failed to perform his part of the contract. In the case of *La Chicotte v. Richmond R. & El. Co.* (15 App. Div. 380, 384) the court say: "The complaint alleged performance of the contract, and over the defendant's objection plaintiff was allowed to prove, not performance, but excuses for not performing the work in accordance with the contract. This question has been many times before the court, and the authorities all hold that it is an elementary rule of pleading that when the plaintiff alleges performance of a contract he must prove performance. He cannot excuse non-performance and recover, because a strict compliance with the obligations of the contract has been either waived or prevented by the defendant." This was a case where the plaintiff had agreed to do a particular piece of work within a given time, and it was held error to permit evidence tending to show that the delay was owing to the lack of diligence on the part of the defendant in getting ready for the work. It is entirely a different case from the one at bar, where the plaintiff

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has performed all that he undertook to perform. In the case of *Lajos v. Eden Musee Americain Co.* (10 Misc. Rep. 148) the plaintiff entered into a contract to bring an orchestra to perform in the defendant's place of amusement at \$500 per week, including the services of the plaintiff's brother, who was to have \$50 per week. The management, for good and sufficient reasons, dismissed the brother, and deducted the amount of his salary from the weekly allowance. Plaintiff sued for the amount of the deduction, alleging performance of the contract. The court say: "That allegation must be intended as an averment of performance of the contract; otherwise it is a mere legal conclusion, and ineffectual for any purpose as pleading. Under a plea of performance evidence of prevention of performance or of waiver is inadmissible. No recovery could be had except upon proof of performance, and this could not be shown. The defendant objected in due time to the admission of the evidence as irrelevant, and moved to dismiss the complaint for want of proof of performance." This is clearly not in point, for here the plaintiff, alleging performance, was seeking to introduce evidence to furnish an excuse for not performing, but no such condition is presented in the case at bar; for the plaintiff not only alleges performance of all the conditions imposed upon him, but proves such performance. *Elting v. Dayton* (43 N. Y. St. Repr. 363) is of the same tenor, as is also the case of *Morowsky v. Rohrig* (4 Misc. Rep. 167). The same is true of *Oakley v. Morton* (11 N. Y. 25).

"It is essential to the legal statement of such a cause of action," say the court in the case of *Bogardus v. New York Life Ins. Co.* (101 N. Y. 328, 334), "that it should show an existing contract, and the performance by the plaintiff of such conditions precedent as are thereby provided, or a tender of their performance, or some adequate excuse for non-performance. This may be done by a general allegation of performance, but in some form the fact must be alleged, and if controverted, proved on the trial." This is what the plaintiff in the case at bar has done. He has shown an existing contract, and a performance by the plaintiff of such conditions precedent as are thereby provided, and, these matters having been put in issue, he has established, by uncontroverted evidence, that he has performed all of the conditions imposed upon him by the contract.

The covenant or agreement that the test should be made by Jones being the covenant or agreement of the defendant, the objections raised upon the trial to the admission of evidence in reference to the substitution of Smith were not well taken, and cannot defeat the judgment in favor of the plaintiff. The evidence was competent as showing the complete failure of the defendant to meet the requirements of his contract, and as showing a perfect obligation on his part to the plaintiff.

The judgment appealed from should be affirmed, with costs.

All concurred.

Judgment affirmed, with costs.

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s 69	882

**JAMES H. HOAG, Appellant, v. EDWARD WRIGHT and MONTROSE CHURCHILL, as Executors, etc., of HESTER HOAG, Deceased, Respondents.**

*Evidence—when the admission of letters between the parties not relating to the subject of the action requires a new trial.*

In an action brought to recover on two promissory notes, given to a son by his mother, who had since died, to which the defense of want of consideration was interposed, a letter written by the son to the mother, and a reply by the latter, both written some two months after the date of the first note and some four years prior to the date of the second one, in which letters the writers criticised each other's conduct relating to the board and care of the mother by the son, but made no reference to the notes, are incompetent, and, being calculated to prejudice the jury, their admission in evidence over the objection of the son constitutes good ground for a new trial where a verdict is rendered against him.

APPEAL by the plaintiff, James H. Hoag, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of Westchester on the 12th day of October, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 5th day of February, 1898, denying the plaintiff's motion for a new trial made upon the minutes.

*Isaac N. Mills*, for the appellant.

*James M. Hunt* [*George W. Elkins* with him on the brief], for the respondents.

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WOODWARD, J. :

There is only one question necessary to be considered upon this appeal, and that is the admission of certain letters over the objection of the plaintiff. The plaintiff was a son and only heir of the late Hester Hoag, and the action was brought on two promissory notes made by the said Hester Hoag to the order of the plaintiff. One of these notes was dated at Yonkers on the 13th of November, 1894, payable on demand, for \$4,000, and the other bore date of Amawalk, October 15, 1890, and was payable on demand, for the sum of \$2,000. The defense denied on information and belief that the said Hester Hoag made the notes in question, or that she delivered them to the plaintiff, and alleged that if any such notes were made or delivered they were without consideration, null and void. Plaintiff introduced the notes in evidence and identified the two signatures as those of his mother, leaving the presumption of consideration and delivery where the law has placed it. (Laws of 1897, chap. 612, §§ 35, 50.)

The defendants did not undertake to produce direct evidence of a want of consideration for the notes, but they did put witnesses on the stand who swore, as experts, that the signatures to these two notes were forgeries. All of the evidence as to the want of consideration for the notes was of a circumstantial nature, based upon the transactions of a financial character between the mother and son, with some testimony as to the plaintiff's conduct towards his mother, including the letter, the introduction of which appears to be fatal error. The letter of the plaintiff to his mother, with an unsigned answer on the back of it, was first introduced merely for the purpose of showing handwriting, but was afterward introduced and read in evidence, to which the plaintiff's counsel duly objected, upon the grounds that it was irrelevant and immaterial. This objection seems well taken. Neither the letter of the plaintiff nor the reply has any relation to the questions at issue, and we are unable to find any authorities, either among those cited or anywhere in the books, which justify the admission of this kind of evidence. The letter of the plaintiff addressed "Mother," recites that "I have learned through Mrs. Williams that you and Aunt Mary contemplate coming here to live in one room as it were. I cannot consent for you to do that, for it will not be any credit to you or me socially or in a business sense to

have you live in that way, and it is not in our agreement, but if you and Aunt Mary are a mind to come and occupy your room and live with us, and pay a reasonable board, I will endeavor to make you as comfortable and as happy as I can. You can either come to your meals at the table or I will send them up to your room, but I cannot think of permitting you to sleep and cook in the same room. Your room will be taken care of and everything done that is needful. Your talk and actions in doing as you have has injured me very much in the past in many ways, and no one can blame me for wanting things differently. When you were sick I did all I could, and if you come and board with me, as I have said above, my home is open to you and Aunt Mary, as it has always been. I will try to make it pleasant and agreeable." Clearly there is nothing in this letter in relation to the notes; nothing in it material to the question of consideration for the notes in suit, or in reference to the question of the making of such notes.

"It is often permissible," say the court, in the case of *Quincey v. White* (63 N. Y. 370, 380), "to prove facts and circumstances as a part of the history of the case, and to show the relation of the parties to the principal transaction;" but it has never been held, so far as we have been able to discover, that an abstract letter, in no wise connected with the principal transaction, was admissible. "It is hardly necessary to inquire," say the court in the case of *Farmers & Manufacturers' Bank v. Winfield* (24 Wend. 419, 426), "whether, supposing it to have been admissible, such a course was correct; for we think it impossible to uphold a verdict which may have resulted from allowing the jury to take with them as evidence a paper confessedly foreign to any of the matters in issue." This was a case in which, in the course of a transaction resulting in a bond and mortgage, one Thomas Williams had, at the request of one Vassar, made a statement of his affairs. On the cross-examination of Williams it was sought to impeach the fairness of this statement, and the court say: "Whether successfully or not, was, I think, entirely immaterial, for I have been unable to see that it had the remotest relevancy to the matter in hand." The trial court interrupted the examination, but permitted the case to go to the jury with the statement of Williams before them. "The submission of the paper in that way to the jury," say the court, "was,

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we think, equivalent to its admission as evidence in the cause. What use the jury may have made of it we cannot say. It had been examined to\* by the plaintiff's counsel, with what effect in the mind the jury it is also impossible to determine. Perhaps they thought it impeached. Its relevancy was not pointed out at the bar, and we have not been able to discover that it had any bearing whatever." Again, the court say in the same case: "It was surmised on the argument that, the paper being immaterial, we must presume that the jury allowed no weight to it. \* \* \* If they see that it must necessarily have tended in his favor; if it made for him in its own nature, or could not possibly prejudice his case, that might be an answer; but so long as the chance is equal that it may have had some effect one way or the other, the party is entitled to the benefit of the principle that irrelevant testimony should be shut out from the jury."

"All evidence," say the court, in the case of *Thompson v. Bowie* (4 Wall. 463, 471), "must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. \* \* \* The general character and habits of Bowie were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the 1st day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted unless the nature of the action involves or directly affects the general character of the party." In this case Bowie sought to avoid payment of certain promissory notes on the statutory grounds that they were given for gambling debts; and it was sought to prove that when in liquor Bowie was given to gambling, and that he was drunk at the time these notes were given.

It is not contended in the case at bar that the introduction of the plaintiff's letter to his mother was specially harmful, but that it was irrelevant and immaterial, and that it was introduced for the purpose of getting before the jury the unsigned reply of the mother, equally

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\* *Sic.*



irrelevant and immaterial, but which could not fail to prejudice the jury against the plaintiff. Without attempting to follow the orthography of this letter, it says: "My dear Child, you say your home has been open to me and Aunt Mary. Neither of us has been beholden to you at all. We have both been servants to you; servants generally have their board and pay for their labor, which you never laid out one penny for me, and, besides, I have taken charge of all your comings and goings and of your patients, waiting on them and working, as you can get no servants to or wife to. What has your wife done to help you but to try to turn your mother out of her home and strip her of every mouthful of victuals, and she had to go to the neighbors for food to eat until she could get things in, and you stood by and seen your woman 'stup' your mother that had been a slave for you, which is no credit to you, much more to allow your woman, that had nothing but an old bedroom set and very little to cover her bed, and very few clothes to her back, only what you got her before she got in here." The letter continues at considerable length in this same strain, but at no point does it make any mention of the notes in issue, or mention any fact which would have the remotest bearing upon the question of their genuineness or of the consideration for such notes; and it is obvious that the only purpose which these two letters were calculated to serve was to prejudice the jury against the plaintiff. Of what possible consequence could it be, in reference to the note made in 1894, that the mother of the plaintiff, sometime subsequent to December 23, 1890, wrote him a letter in which she scolded him for some real or fancied grievance? The first note was dated October 15, 1890, more than two months before either of the letters was written; perhaps, before the grievance complained of, and with absolutely nothing to connect these letters with the transaction resulting in the issuing of these notes. It was clearly error to permit them to go before the jury. The effort of a jury to arrive at the merits of a question involving the validity of two promissory notes upon evidence that the plaintiff and his mother had at one time exchanged letters mutually criticising each other in reference to a home for the mother and aunt might be imagined; it could not be described. There is nothing in the evidence to show that these letters were written with these notes in view. One of the notes, if it

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was a valid note, had then been in existence more than two months. Clearly no inference as to the question of a consideration or of the validity of the notes could be drawn from letters written long subsequently and which did not pretend to deal with the question at issue. The other note was made nearly four years afterward, if made at all as a valid note, and it would be absurd to contend that there was anything in this garrulous letter from the mother to indicate either that the note was forged or that it was given without consideration. The verdict of a jury, considering such evidence, must be presumed to have been prejudiced against the plaintiff.

In the case of *United States v. Ross* (92 U. S. 281) the court say: "Because somebody's cotton (how much or how little is not shown) arrived at Kingston from Rome at some time not known and was forwarded to Chattanooga before the 19th of August, 1864, it is inferred that the claimant's thirty-one bales, presumed to have reached Chattanooga, thus arrived and were forwarded; and, because forty-two bales were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimant's bales were among them. These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed. Starkie on Evid., p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by *direct* evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences." Chamberlayne's Best on Evidence (Am. Notes,

p. 258), after quoting Mr. Justice STEPHEN'S definition of relevancy, lays down the rule that "legal relevancy, which is essential to admissible evidence, requires a higher standard of evidentiary force. It includes logical relevancy, and, for reasons of practical convenience, demands a close connection between the fact to be proved and the fact offered to prove it. All evidence must be logically relevant, that is, absolutely essential. The fact, however, that it is logically relevant does not insure admissibility; it must also be legally relevant. A fact which, 'in connection with other facts, renders probable the existence' of a fact in issue, may still be rejected if, in the opinion of the judge and under the circumstances of the case, it be considered essentially misleading or too remote."

It is clear, then, that under the rules laid down by text writers, and sanctioned by the courts, the admission of these letters was error; they did not relate, even remotely, to the issues involved in the action. The fact that the mother and the plaintiff quarreled in 1890, two months after the date of the first note and four years prior to the date of the second, could give the jury no possible light upon the question of whether these notes were given for a valid consideration, or whether they were forgeries; and these were the issues involved. "It is a well-established principle," say the court in the case of *People v. Corey* (148 N. Y. 476, 489), "that illegal evidence which has a tendency to excite the passions, arouse the prejudices, awaken the sympathies, or warp or influence the judgment of jurors in any degree, cannot be considered as harmless;" and that rule is especially applicable to this case, where the evidence could have no other possible effect. The question of a gift was not involved. The plaintiff stood upon the legal presumption that the notes were given for a valuable consideration, and evidence that the mother was not likely to give the plaintiff the notes was clearly irrelevant, because that question was not in issue.

"It is well settled in this State," say the court in the case of *People v. Strait* (154 N. Y. 165, 171), "that a party is entitled to the benefit of any competent evidence he may offer which bears upon a controverted question of fact embraced in the issue;" but we have found no instance in which it has been held that the court was warranted in receiving incompetent evidence of a question of fact not in issue. Without expressing any opinion as to the merits

of the case, we are forced to conclude that the judgment and order appealed from should be reversed, and that a new trial should be granted, costs to abide the event.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

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FREDERICK KALFUR, an Infant, by FREDERICK W. KALFUR, his Guardian ad Litem, Respondent, v. BROADWAY FERRY AND METROPOLITAN AVENUE RAILROAD COMPANY, Appellant.

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*Negligence — injury to a child necessitating amputation of one of its legs — where the trial court has not disclosed its real judgment a verdict for \$15,000 will not be set aside by the Appellate Division.*

In an action to recover damages occasioned by the injury of a child through the alleged negligence of a railroad company, necessitating the amputation of one of his legs above the knee, a verdict of the jury for \$15,000 will not be set aside by the Appellate Division as excessive, where the trial court has, in the exercise of its inherent discretionary power, felt itself constrained by precedents in other cases to deny an application to set aside the verdict as excessive, and the Appellate Division is not, therefore, able to determine what the real judgment of the trial court was upon the facts of the case.

GOODRICH, P. J., dissented.

APPEAL by the defendant, the Broadway Ferry and Metropolitan Avenue Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Kings on the 30th day of March, 1898, upon the verdict of a jury for \$15,000, and also from an order bearing date the 30th day of March, 1898, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

*Thomas S. Moore*, for the appellant.

*Charles J. Patterson*, for the respondent.

WOODWARD, J. :

The plaintiff in this action, an infant, was injured in an accident on the line of the street surface railroad operated by the defendant on Metropolitan avenue in Middle Village, Queens county, on the 15th of October, 1892. It was established on the trial, and it is not ques-

tioned on this appeal, that the child was injured through the negligence of the defendant, making it necessary to amputate one of the legs above the knee. The only point argued in this court is that the verdict of the jury, on which a judgment for \$15,941.25 was entered in behalf of the plaintiff, is excessive.

The learned trial court, in denying a motion for a new trial, writes an opinion in which it enters into a calculation tending to show that the judgment is excessive, and says: "I had an opinion, growing out of my own view and discretion, in respect of whether the verdict be excessive. But that is not what must control me. Counsel have furnished me with a list of the cases in which such verdicts have and have not been reduced. Verdicts as large and larger for like injury have been upheld, as a rule, though it is true some have been reduced. Exercising my discretion in the light of precedent, and constrained thereby, I must deny the motion to reduce. Trial judges were never so reluctant to exercise any discretion whatever as they are at present, for reasons that are growing obvious to the bar. They do not have things presented to them under the disguise of print, and with academic afterthoughts and refinements, but in their every day reality, just as they are generally seen and understood. Discretion exercised under these different conditions cannot in the nature of things be the same."

Whatever the weight of precedent which has constrained the learned court to forego the exercise of a sound discretion in the discharge of its official duties, there is an abundance of authority for the exercise of such discretion. Within the year Presiding Justice GOODRICH, of this court, writing the opinion in the case of *Branagan v. Long Island R. R. Co.* (28 App. Div. 461), said: "The final sentence may be open to the construction that the learned justice stated that the weight of precedent was against the right of the trial court to set aside or to reduce a verdict at the Trial Term, and it is only for this reason that we take occasion to say that the residence of such a power in the court at Trial Term is inherent and beyond question, and needs no citation of authority. We have had frequent occasion, during the existence of the present Appellate Division of the Supreme Court, to exercise the power of reducing verdicts which we considered excessive, but this power can never be used more satisfactorily than at the Trial Term, where the

court has the opportunity, not only of seeing and hearing the parties and witnesses, but of judging of their behavior on the stand. \* \* \* It is to be regretted that this power has not more frequently been resorted to in cases where it is so clear that such manifest injustice has been done that the Appellate Division has been constrained to review and reduce the amount of verdicts which have apparently been rendered under the influence of passion, prejudice, partiality, sympathy or misconception."

While, therefore, there is undoubted authority for the exercise of discretion on the part of the trial court, this is a power not to be used arbitrarily or without careful consideration of the facts as established by the evidence. In the opinion handed down by the learned trial court, we are told that the "plaintiff, a boy eighteen months old at the time of the injury, lost his leg below the knee." The pleadings and the evidence clearly establish that in the case at bar the plaintiff lost his leg above the knee, and, in the absence of the exercise of that discretion inherent in the court at Trial Term, we are unable to determine whether the learned court would, in view of the facts, deem itself justified in reducing the verdict found by the jury. In the absence of such light upon the question, and in view of the fact that the law contemplates that the person injured shall be compensated for the loss and the pain and suffering which he has been called upon to endure through the negligence of another, we are not prepared to say that the verdict in this case is excessive.

The judgment should be affirmed.

All concurred, except GOODRICH, P. J., who read for reversal.

GOODRICH, P. J. (dissenting):

I cannot concur in the conclusion of Mr. Justice WOODWARD for affirmance as I think grave error has been committed by the learned justice below in refusing to exercise his discretion. In denying a motion to set aside the verdict as excessive he delivered an opinion which clearly evinces his belief that the verdict was excessive, but said that his opinion upon the subject was not what must control him, and intimated a doubt whether it was wise for him or any trial justice to exercise his unquestionable prerogative to set aside an excessive verdict.

As Mr. Justice WOODWARD states in his opinion, there can be no doubt that it is the duty of the trial justice to exercise his discretion in a proper case, and, in my opinion, to refuse to do so constitutes reversible error.

It is settled law in this State that the Court of Appeals will not resort to the opinion of the General Term or the Appellate Division of the Supreme Court in passing upon the questions involved in an appeal to that court. This is in accordance with section 1338 of the Code of Civil Procedure relating to such appeals and providing that on such an appeal it must be presumed that the judgment was not reversed, or the new trial granted upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from. (*Matter of Laudy*, 148 N. Y. 403.)

I am, however, unable to find any authority which applies this rule to the Appellate Division in deciding an appeal from the trial court. On the contrary, there can be no doubt of the right of the Appellate Division to consider on an appeal the opinion of the trial court, as rule 41 of the General Rules of Practice provides for the printing of such opinion as part of the record on appeal.

In *Hewlett v. Wood* (67 N. Y. 394, 399) the court, in speaking of an appeal to this court, said: "The order cannot be qualified in its operation and effect by reference to the opinion of the court. The court speaks by its order, and effect must be given to it according to its terms. If the order appealed from was made in the exercise of the discretion of the court the appeal must be dismissed; but if granted by reason of supposed want of power, as it seems to have been, it must be reversed and the proceedings remitted that the court may, in its discretion, make such disposition of the application as shall be deemed proper. It was the duty of the court below to decide the motion upon its merits and in the exercise of the discretion vested in it."

It is manifest that the constraint felt by the learned trial justice has prevented the use of his discretion upon the motion to set aside the verdict, whereby the appellant has been deprived of a legal right, and for this reason I think that the order should be remitted to the trial justice in order to give him an opportunity to exercise his discretion in passing upon the motion to vacate the verdict.

Judgment and order affirmed, with costs.

OSCAR JOHNSON, Respondent, v. THE BROOKLYN HEIGHTS RAILROAD  
COMPANY, Appellant.

*Negligence — the driver of a wagon on the tracks of an electric railroad injured by a collision with a car approaching from the rear — his failure to look back constitutes contributory negligence.*

The driver of a market wagon, while driving on a dark evening through a suburban district on the track of an electric railroad with which and with the operation of the cars thereon he was familiar, was overtaken by one of the cars at a point where there were no artificial lights with the exception of two or three about a neighboring building, and where the roadway outside the tracks was too narrow to permit of driving, and in the collision he was thrown from his seat and injured. Although he had been driving on the tracks for a mile or more he had not once looked behind him, and the first intimation that he had of the approach of the car was some one calling to him from behind to get out of the way, and while attempting to turn his team into the other track he was struck.

In an action brought to recover for the injuries thus sustained,

*Held*, that the plaintiff had failed to establish the absence of contributory negligence on his part, and was not entitled to recover;

That, while the railroad company owed to the plaintiff the duty of using reasonable care in the operation of its cars to prevent a collision, the plaintiff could not enter upon the tracks of the defendant and rely upon the defendant's servants seeing him in time to give him warning of the approach of a car.

APPEAL by the defendant, The Brooklyn Heights Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Queens on the 22d day of April, 1898, upon the verdict of a jury for \$20,000, and also from an order entered in said clerk's office on the 13th day of May, 1898, denying the defendant's motion for a new trial made upon the minutes.

*John L. Wells*, for the appellant.

*Samuel D. Morris*, for the respondent.

WOODWARD, J. :

The plaintiff in this action was employed as a driver on a market wagon. On the 8th day of January, 1897, he was returning to the home of his employer in the town of Newtown, Queens county, and was passing over Corona avenue, through which the double-track street surface railroad of the defendant company is operated, by means of electricity, using the overhead trolley system. Between the

34	271
40	145
40	240
40	318
40	608

34	271
47	502
34	271
655	12
155	13
34	271
456	511



hours of seven and eight o'clock in the evening the plaintiff, accepting his testimony, entered upon the tracks of the defendant company and drove along the right-hand track a distance of a mile or more, and when at a point near the intersection of Myrtle avenue with Corona avenue, he was overtaken by one of the cars of the defendant, and was thrown from his seat, sustaining the injuries for which he now seeks recovery.

The plaintiff testifies that the first intimation he had of the approach of the car was when he heard some one behind him calling to him to get out of the way. He looked out through the small glass in the rear of the covering over his head, at the same time drawing his team to the left, intending to throw them into the other track, but before the wagon had cleared the track it was struck by the advancing car, with the result above set forth. It was in evidence that the night was dark, and that at the location of the accident there were no artificial lights, with the exception of two or three upon the porch or in the immediate neighborhood of a small saloon or hotel, and that the roadway, outside of the tracks of the railroad, was too narrow to permit of driving. The plaintiff also testified that he was familiar with this part of the roadway; that he had traveled it for a period of thirty days on every day except Sundays, and was familiar with the operation of the cars over the line.

Defendant's counsel, at the close of plaintiff's case, and again at the close of the evidence, moved to dismiss the complaint on the ground that the plaintiff had failed to show absence of contributory negligence, and we are asked to consider the exception taken on this appeal.

We are of opinion that this motion should have been granted; that the plaintiff had utterly failed to establish by the evidence presented that lack of contributory negligence which he was bound to do in order to maintain his action. There was absolutely no evidence, so far as we are able to discover, that the plaintiff was not guilty of contributory negligence; no evidence of the exercise of any degree of care to guard against the danger which, according to his own testimony, was known to him by reason of his familiarity with the roadway and the method of operating the cars of the defendant at this point. It did not appear that the plaintiff, who had been

driving upon the track for a distance of a mile or more, had once looked back, or that he had listened for evidences of the approach of a car, or that he had done any of those things which a reasonably prudent man would or ought to have done under the same circumstances. There are no presumptions in favor of the plaintiff. The law imposes upon him the burden of proving by a fair preponderance of evidence, not alone that the defendant has been guilty of negligence resulting in the injury, but that the plaintiff has been free from negligence contributing to the accident; and where there is no evidence of the exercise of any degree of care on the part of the plaintiff, and when there are no circumstances from which such an inference may be fairly drawn, there is clearly no question for the jury.

"It is the well-settled law of this State," say the court in the case of *Whalen v. Citizens' Gas Light Co.* (151 N. Y. 70), "that, in actions of this character, the absence of negligence on the part of the plaintiff contributing to the injury must be affirmatively shown by the plaintiff, and that no presumption of freedom from such negligence arises from the mere happening of an injury;" and in the case of *Weston v. City of Troy* (139 N. Y. 281) it is said that "The presumption which a wayfarer may indulge, that the streets of a city are safe, and which excuses him from maintaining a vigilant outlook for dangers and defects, has no application where the danger is known and obvious."

In the case at bar the plaintiff is shown to have been familiar with the roadway and with the method of operating the cars upon the line of the defendant's street railroad; and the fact that there was no room for him to drive outside of the double tracks of the defendant imposed upon the plaintiff, in common with the defendant, the duty of exercising a higher degree of care than would have been necessary under less dangerous circumstances. The danger was both known and obvious; and while the defendant owed the plaintiff the duty of using reasonable care in the operation of its cars to prevent the collision, the plaintiff could not enter upon the tracks of the defendant and rely wholly upon the defendant's servants seeing him in time to give warning. He was in a situation of danger; he was occupying the tracks of the defendant subject to the paramount right of the latter, to whom he owed the duty of

using reasonable care, not only to avoid collisions, but to keep out of the way and allow the cars to pass without unnecessarily impeding their progress; and, an accident happening to the plaintiff under these circumstances, he is bound to show affirmatively that he was exercising that reasonable care which the known and obvious dangers of his situation demanded.

"It is true that the want of negligence," say the court in the case of *Wiwrowski v. L. S. & M. S. R. Co.* (124 N. Y. 420), "may be established from inferences which may be properly drawn from the surrounding facts and circumstances, as in the case of *Galvin v. Mayor, etc.* (112 N. Y. 223). But such inference cannot be drawn from a presumption that a person will exercise care and prudence in regard to his own life and safety, for the reason that human experience is to the effect that persons exposed to danger will frequently forego the ordinary precautions of safety. And when the circumstances point as much to the negligence of the deceased as to its absence, or point in neither direction, a nonsuit should be granted."

In the case at bar the circumstances cannot be said to point to the reasonable inference that the plaintiff was free from contributory negligence. He was driving upon the tracks of a street surface railway operated by electricity. He was in a suburban community, where the cars were operated at a high rate of speed, and he was familiar with this fact. He was on the line of track where all of the cars must approach him from the rear, and he was passing down a grade where it was more difficult to stop a car than would have been the case on level ground, or where the grade was running the other way. Clearly, there could be nothing in this state of facts from which a jury might reasonably infer that the plaintiff was free from contributory negligence, and, in the absence of direct evidence upon this point, there was nothing before the jury on which to find a verdict in favor of the plaintiff, and the motion of the defendant's counsel for a nonsuit should have been granted. (*Caven v. City of Troy*, 52 N. Y. Supp. 804; *Jencks v. Lehigh Val. R. Co.*, 53 id. 625.)

The judgment and order appealed from should be reversed.

All concurred.

Judgment and order reversed and new trial granted, costs to abide the event.

JOSEPH M. D'ARCY, Appellant, v. THE LONG ISLAND RAILROAD  
COMPANY, Respondent.84  
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*Negligence—fall of an iron plank between a car and a station platform—liability of the railroad company for an injury occasioned thereby to an employee.*

A railroad company which has provided an iron plank of sufficient length, width and strength to facilitate the unloading of freight from a car to a station platform, is not liable for injuries sustained by an employee who, while stepping thereon preparatory to assisting in the work, is injured in consequence of the plank falling to the ground between the car and the platform, simply because, as he alleged, it was not supplied with hooks or other fastenings which would prevent it from slipping from its place, although it is shown that the plank had fallen on other occasions.

APPEAL by the plaintiff, Joseph M. D'Arcy, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 16th day of April, 1898, upon the dismissal of his complaint by direction of the court after a trial at the Kings County Trial Term.

*William F. Goldbeck*, for the appellant.

*William J. Kelly*, for the respondent.

WOODWARD, J.:

This was an action for personal injuries sustained by the plaintiff while employed in assisting to unload a car of the defendant railroad company. He was regularly employed as a helper on one of the defendant's express wagons, but on the day of the accident he had completed his day's work and was, according to his testimony, waiting for orders, when he was called upon to assist in unloading a car which was standing at the station platform. Two other men were at the time engaged in the work of removing the freight, using ordinary hand trucks, and passing over an iron plate or plank in going to and from the car to the platform. Just as the plaintiff was about to commence his labors he stepped upon this plank or iron plate, which fell to the ground between the platform and the car, carrying the plaintiff with it and severely injuring his foot.

The trial court dismissed the complaint upon the grounds that "A plank is one of the commonest things in the world, as we all

know, and it is not customary to fasten planks at the ends either. I cannot see any case here, and I dismiss the complaint." The plaintiff excepted to the rulings of the court, and, upon appeal, urges that the iron plate was not a plank, but a bridge, and that it was the duty of the defendant to have made the bridge secure by means of some kind of a fastening, so that it could not fall. There was some evidence in the case that this plank, or iron plate, had fallen on two other occasions, but we are unable to see that this had any bearing upon the question. The master "is not bound to furnish the best known appliances, but only such as are reasonably fit and safe. He satisfies the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the master liable, not a mere error of judgment." (*Harley v. B. C. M. Co.*, 142 N. Y. 31.) This rule was considered and applied in the case of *Marsh v. Chickering* (101 N. Y. 396), where the plaintiff sought to recover damages because of the fact that his employer had not furnished a ladder fitted with hooks and spikes, instead of an ordinary ladder, for the purpose of lighting lamps. After stating the general rule, that the master is assumed to know the requirements for the work to be performed better than the servant, the court say: "In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employee has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work to which he is accustomed, and in regard to which he has perfect knowledge, can hardly be said to have a claim against his employer for negligence, if in using a utensil, which he knows to be defective, he is accidentally injured." In the case at bar there is no suggestion that the plank was defective in the sense that it was

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not strong enough, or wide enough, or long enough for the purpose for which it was used, but simply because it was not supplied with hooks or other fastenings which would make it impossible for the plank to slip from its place. As was said in the case of *Marsh v. Chickering* (*supra*), "It might, perhaps, have been more perfect if it had had hooks and spikes, but this improvement was not absolutely essential to relieve the defendants from liability. It was enough that it was reasonably safe and suitable within the rule cited, and under such circumstances an action will not lie."

The judgment of the trial court should be affirmed, with costs.

GOODRICH, P. J., concurred in result.

Judgment unanimously affirmed, with costs.

**Cases**  
DETERMINED IN THE  
**FIRST DEPARTMENT**  
IN THE  
**APPELLATE DIVISION,**  
**November, 1898.**

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SAMUEL FAILE and WILLIAM HALL PENFOLD, as Trustees under  
the Last Will and Testament of GEORGE FAILE, Deceased,  
Respondents, *v.* HENRY J. CRAWFORD, Appellant.

*Specific performance—effect of the death of one of the grantors before the actual  
delivery of the deeds to the vendee.*

Where, in an action for specific performance, both the deed originally tendered and a confirmatory deed are offered in evidence as muniments of title, and the trial court in the judgment decreeing specific performance does not direct the delivery of such confirmatory deed to the vendee, the fact that, pending an appeal to the Appellate Division, by whose judgment the delivery of the confirmatory deed is directed, one of the grantors named in and who executed both the deed originally tendered and the confirmatory deed dies, does not affect the validity of the deeds nor relieve the vendee from his obligation to complete his purchase.

APPEAL by the defendant, Henry J. Crawford, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of July, 1898, denying the defendant's motion to be relieved from complying with a judgment of specific performance of a contract for the purchase of real estate theretofore entered in the action.

*Eugene Frayer*, for the appellant.

*Charles F. Brown*, for the respondents.

VAN BRUNT, P. J.:

This case has been before the Appellate Division, and the question was as to the sufficiency of the title which had been offered to the defendant, who was a purchaser at a public sale. The defendant having rejected the title, the plaintiff brought this action for specific performance. Upon the trial, in order to avoid all question in regard to the title, the plaintiff, in addition to the deed of March 28, 1896, tendered and introduced in evidence an additional conveyance dated May 25, 1896, executed by parties other than those who had executed the deed of March 28, 1896, tendered to the defendant prior to the commencement of the action. The Special Term directed the specific performance of the contract, and required the plaintiff to deliver the deed of March 28, 1896, which had been previously tendered. On appeal to the Appellate Division this judgment was modified by directing also the delivery of the deed of May 25, 1898, which had also been introduced upon the trial. After the argument at the Appellate Division and before the decision, one of the persons who had executed the confirmatory deed, which was tendered and offered in evidence at the trial, and who, as trustee, had executed the deed originally tendered, died. The Appellate Division, in settling and making its order upon appeal, took no notice of this fact. Thereupon the defendant, complaining that such death, before the delivery of the deeds to him, rendered them inoperative and void, made a motion in the court below asking for an order relieving him from his contract of purchase and from the judgment, because of the death of one of the grantors who executed the confirmatory deed. The motion was denied, without prejudice to an application to the Appellate Division. Thereupon the defendant made this motion to be relieved from his purchase.

It is undoubtedly a well-settled rule that delivery of a deed is a necessary part of its execution, and that the mere signing of a deed, or its acknowledgment, of themselves give no efficacy to the instrument, and that delivery ordinarily implies acceptance of the instrument upon the part of the grantee. But proof of actual acceptance is not always required, because a party is presumed to accept that which is for his own benefit.

In this case, had the judgment of the Special Term required the



delivery of the deeds in question, and they had been deposited with the clerk of the court to abide the event of the appeal, there would be no question whatever but that the death of a grantor in the deed would not in any way affect its efficacy in case the requirement of delivery was finally affirmed by the appellate court. We can see no difference between the present situation and the condition referred to, of the deposit of a deed with the clerk of the court in pursuance of a judgment. These deeds were offered in evidence as muniments of title. They were delivered to the court to be disposed of as it saw fit by its final judgment; and the court had power to say in its judgment that the plaintiffs had done all that was required of them to do in order to make a perfect title, and it was for the defendant to say whether he accepted or refused the muniments of title which had been deposited in court for his benefit.

It is true that the judgment of the Special Term did not require the delivery of the deed of May 25, 1898, but that was not the final judgment in the action. This deed had been offered in evidence as an additional muniment of title, to be disposed of as the final judgment in the action should direct. The Appellate Division disposed of it and adjudged that the defendant was entitled to it in order to perfect his title. This adjudication and the handing over of the deed in pursuance thereof necessarily related back to the time when it was placed *in escrow* with the court to await the final determination of the action. The deed in question was placed beyond the control of the grantors, subject to the will of the court, to be disposed of as it saw fit and as in its judgment justice required. Acceptance upon the part of the grantee was not required in order to make the deed operative when the time came for its manual delivery. Had the deed been deposited *in escrow* subject to the right of the grantee to claim it upon performing a certain condition, the death of the grantors would not have destroyed the deed. The court held these deeds and decided that upon the payment of certain purchase moneys the defendant would be entitled to all the muniments of title which had been offered during the trial for the purpose of fortifying his title, and placed in the custody of the court. As for the confirmatory deeds which were tendered upon the argument of this motion, we think, although not necessary, in order that the defendant's title should be protected in every way, that possibly as a

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condition of the denial of the motion, they should be delivered to the defendant.

The order appealed from should be affirmed, with ten dollars costs and disbursements, upon condition of the delivery of the deeds tendered upon the argument to the defendant.

PATTERSON, O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements, upon condition of the delivery of the deeds tendered upon the argument to the defendant.

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THE MILLIE IRON MINING COMPANY, Appellant, v. ERNST THALMANN and KARL THALMANN, Respondents.

*Landlord and tenant — the duty of the tenant to demand possession is not affected by a threat of the officers of the lessor corporation to refuse possession, made before the commencement of the term — effect of the lessor continuing in possession and taking ore from a mine.*

The president and the secretary and treasurer of a corporation which, by an instrument under seal had leased to certain parties its iron mines, applied, prior to the commencement of the term granted by such lease, to one of the lessees for a loan, and upon the application being denied, the secretary and treasurer said, "If you don't make the loan you can't have the mine," to which the lessee replied, "Very well, we can do without the mine."

*Held*, that the threat was not such a refusal on the part of the corporation to give possession of the mine as would relieve the lessees from the obligation to pay the rent reserved by the lease, especially as there was no proof that they had made any demand of possession after the commencement of the term of the lease, and as it did not appear that the president and secretary and treasurer, at the time of the transaction in question, were acting on behalf of the corporation, or that they had any authority to threaten to refuse to give possession of the demised premises.

In such a case, the lessor is not required at the commencement of the term of the lease to abandon the mine and leave it vacant and uncared for, and the fact that while in possession of the mine during the term of the lease the lessor has raised and removed ore therefrom, there being no evidence as to whether such operations resulted in a profit or a loss, is not a defense to an action for the rent accruing under the lease.

APPEAL by the plaintiff, The Millie Iron Mining Company, from  
a judgment of the Supreme Court in favor of the defendants,  
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entered in the office of the clerk of the county of New York on the 1st day of March, 1898, upon the verdict of a jury rendered by direction of the court.

*Esek Cowen*, for the appellant.

*Frederic E. Perham*, for the respondents.

VAN BRUNT, P. J. :

On the 6th of August, 1890, the plaintiff, a Michigan corporation, by an instrument under seal, leased to the defendants its iron mine in the State aforesaid for the term of two years from the 1st of January, 1891, the defendants agreeing to pay a certain royalty for ore removed from the demised premises by them during the continuance of the lease. They also agreed to pay a royalty upon 5,000 tons of ore in each year, whether any ore was removed by them or not. It was expressly covenanted that the royalty should be treated as the rent of the premises. The defendants also agreed to pay the taxes upon the mine and ore during the years 1891 and 1892. The defendants did not take possession of the premises on the 1st of January, 1891, nor at any time thereafter, nor did they demand possession thereof; and the plaintiff remained in possession, removing some ore in each of these two years. The plaintiff, in April, 1895, began this action to recover the rent agreed upon and the taxes, and for breach of another condition of the lease in respect to the taking out of ore. The answer admitted the making of the lease, and denied that possession of the mine had been taken by the defendants or tendered to them by the plaintiff, and set up, amongst other defenses, that before the 1st of January, 1891, the plaintiff refused to deliver the premises described in the lease, and notified the defendants that they could not have the same or the possession thereof, and that the defendants, although ready and willing to take the premises, were prevented by the plaintiff from doing so and were deprived of the possession of the premises during the whole term.

Upon the trial the defendants proved that during the entire period of the lease the plaintiff was in possession of the mine and raised and removed ore therefrom; but there was no evidence as to whether such operations resulted in a profit or a loss. They also proved that

the plaintiff had not demanded any rent or royalty until March, 1895, the time of the commencement of this action, and that the plaintiff never tendered the mine to the defendants. They further proved that in December, 1890, Mr. D. S. Dessau, who was president of the company, and Mr. Simon Dessau, who was its secretary and treasurer, came to the office of the defendants and made a demand upon the defendant Ernst Thalmann for a loan of \$15,000, which was declined; that thereupon Mr. Simon Dessau said: "If you don't make the loan you can't have the mine," whereupon Mr. Thalmann said: "Very well, we can do without the mine," and, as witness stated, "they left in a huff." Upon this state of facts the jury rendered a verdict by direction of the court in favor of the defendants, and from the judgment thereupon entered this appeal is taken.

It is urged upon the part of the defendants that the transaction of December, 1890, in which the Dessaus applied for the loan of \$15,000, was a refusal upon the part of the company to give possession of the mine. It is difficult to see how such an interpretation can be placed upon the transaction. There is no proof that they were acting on behalf of the corporation, and no proof of any authority conferred upon them to threaten to refuse possession, for this is all that they did. There is no proof, moreover, that the defendants made any demand of possession or any request that they might be let into possession of the premises after the commencement of the term of the lease.

It is urged that a demand of possession after the conversation which took place would be entirely nugatory as the demand must be made necessarily of the officers of the company, who had already threatened that they would not give possession of the mine. It is sufficient to say that it appears that this was a conversation in which there was a great deal of heat upon both sides; that the term had not commenced, and that it was necessary for the defendants, in order to be released from their contract, to put the plaintiff in default by a refusal of possession upon due demand after the term had commenced. There is no law which requires a landlord to hunt up his tenant and ask him to go into possession of the premises before he can claim the rent which his tenant has agreed to pay. It is the duty of the tenant to demand possession of the premises at the prem-

ises, and it requires something more than heated or angry conversations in regard to a collateral matter to excuse a tenant from demanding possession when his term has commenced.

In view of the foregoing facts, and because it is urged that the plaintiff remained in possession of and operated the mine, it is claimed that there was a surrender of the lease by operation of law and an acceptance of such surrender. The plaintiff was not required to abandon its mine and leave it vacant and uncared for. It had a right to use it until requested to give possession in pursuance of the contract of lease, and, no such demand having been made, it was entitled to remain in possession of, and to care for and to use its property. It might as well be said that where a landlord rents his house he is bound to vacate it before any demand of possession upon the part of the tenant or any evidence of the latter's willingness to enter into the premises and care for the same as he is required to do. We are of opinion, therefore, that the evidence failed to establish a refusal to give possession or that there was any surrender of the lease by operation of law, or otherwise, upon the part of the defendants, which was accepted by the plaintiff.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BARRETT, RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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JAMES BRADLEY, as Administrator, etc., of JAMES BRADLEY, JR.,  
Deceased, Appellant, v. SECOND AVENUE RAILROAD COMPANY,  
Respondent.

*Negligence — a passenger on a street car killed by being thrown over the dashboard — a change in his testimony made by a witness on a second trial, the probable cause of the accident and the fact that the deceased was standing on the platform, all present questions to be decided by the jury.*

In an action brought to recover damages arising out of the death of a passenger who, while riding upon the front platform of a street railroad car, was thrown over the dashboard, a witness testified that the jerk was as if the driver had put the brake on and then let it go, or as if there was a rock or something on

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the car track, and this, being the sole evidence on the question of negligence, was held on appeal from a judgment in favor of the plaintiff to be insufficient to show negligence upon the part of the defendant. On a second trial the same witness testified that he saw the driver put on the brake as quickly as he could, and then suddenly let it go again; and another witness, not examined upon the first trial, also testified that he saw the driver put the brake on suddenly, and that the plaintiff's intestate was thrown over the dashboard.

*Held*, that, even if the court were of opinion that the first witness had amended his testimony to fit the opinion of the General Term upon the previous appeal, that fact would not authorize the court to take the case away from the jury, as it was simply a fact to be considered by the jury in weighing his evidence;

That it was also a question for the jury whether it was a physical impossibility that the accident could have happened if the brake were suddenly put on and as quickly let go;

That if the driver had made this sudden and unusual application of the brake, by which the deceased was thrown over the dashboard of the car, it was incumbent upon the defendant to excuse this extraordinary management of the car by showing the existence of some emergency which appeared to require such prompt and decisive action;

That the fact that the deceased was standing upon the front platform of the car, and that snow had previously fallen, rendering everything somewhat slippery and slushy, did not, in view of the fact that he was smoking, and that it was the custom of the defendant to allow smoking upon the front platform, constitute, as matter of law, conclusive evidence of contributory negligence, it being a question for the jury to determine whether from the evidence any reasonable excuse had been offered for his being there.

APPEAL by the plaintiff, James Bradley, as administrator, etc., of James Bradley, Jr., deceased, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 28th day of February, 1898, upon the dismissal of his complaint by direction of the court after a trial at the New York Trial Term.

*Sumner B. Stiles*, for the appellant.

*Charles F. Brown*, for the respondent.

VAN BRUNT, P. J.:

This action was brought to recover damages for the death of the appellant's intestate through the alleged negligence of the defendant. This case has been previously tried, resulting in a verdict and judgment for the plaintiff, which was reversed by the General Term upon the ground that there was not sufficient evidence of the

defendant's negligence and of the freedom of the plaintiff's intestate from contributory negligence (90 Hun, 419). The accident which resulted in the death of the plaintiff's intestate occurred on the 25th of January, 1895. He was a passenger upon one of the defendant's horse cars going up town, boarding the car between Twenty-sixth and Twenty-seventh streets. He rode upon the front platform of the car, standing behind the driver on the right side, with his back against the window, and smoking a cigar. When the car reached a point between Sixty-third and Sixty-fourth streets and was going on a slight down grade, it gave a sudden jerk and the deceased was thrown over the dashboard, under the wheels of the car, and killed. Upon the previous trial, one James Carroll was a witness and testified that the jerk was as if the driver had put the brake on and then let it go, or as if there was a rock or something on the car track — anything like that. This was the sole evidence on the question of negligence, and the court held upon appeal that it was insufficient to show negligence upon the part of the defendant in the management of its car. There was no evidence whatever that the brake had been suddenly put on, and the testimony was entirely consistent with the assumption that the accident had happened without the brake being put on at all, and hence that there was nothing from which the jury were authorized to impute negligence to the driver of the car. Upon the second trial, the witness Carroll testified that he saw the driver put on the brake as quickly as he could and then all of a sudden let it go again. Another witness who was not examined upon the previous trial — a Mr. Allen — testified that he also saw the driver put the brake on suddenly and that the plaintiff's intestate was thrown over the dashboard.

Even though the court should be of the opinion that the witness Carroll had amended his testimony to fit the opinion of the General Term upon the previous appeal, that fact would not authorize the court in taking the case away from the jury. It was simply a fact to be considered by the jury in weighing his evidence. (*Williams v. Delaware, Lackawanna & W. R. R. Co.*, 155 N. Y. 158.) The history of the case cited upon that subject is somewhat instructive, it having been twice to the General Term and twice to the Court of Appeals (39 Hun, 430; 116 N. Y. 628; 92 Hun, 219; 155 N. Y. 158). In this case, in addition to Carroll's testimony, we have

another witness sworn, who was not examined upon the former trial, and who testifies to the same fact.

It is urged upon the part of the respondent that Carroll's testimony, taken as a whole, was substantially to the same effect as before, but as the complaint was dismissed, the most favorable version of his testimony must be taken by the court in considering this appeal. It is also urged upon the part of the respondent that it was a physical impossibility that the accident could have happened if the brake were suddenly put on and as quickly let go. This is a consideration to be submitted to the jury. They are to judge as to whether there was a sufficient interval between the putting on of the brake and the release of it to throw the plaintiff's intestate over the dashboard, which seems to have occurred. If there was upon the part of the driver of the defendant this sudden and unusual application of the brake, by which the deceased was thrown over the dashboard of the car, it was incumbent upon the defendant to excuse this extraordinary management of the car by showing the existence of some emergency which appeared to require such prompt and decisive action.

The remaining question to be considered is as to whether the plaintiff has sustained the obligation cast upon him by the law, of showing want of contributory negligence upon the part of his intestate. When the case was before the General Term, it appeared that the deceased was standing upon the front platform of the car without any apparent reason, and that there were considerable accumulations of snow and ice upon the track which had made it difficult to manage the car. Upon the second trial, however, the evidence tended to show that it had not been snowing much at the time of the accident, and that sufficient snow had not fallen to cause any unusual movements of the car, although everything was somewhat slippery and slushy. It further appeared that, at the time of the happening of the accident, the deceased was smoking, and that it was the custom of the defendant to allow smoking upon the front platform. It cannot be held that the mere fact that the deceased was standing upon the front platform is, as matter of law, conclusive evidence of contributory negligence. That depends upon the circumstances of each individual case, and it is a question for the jury to determine whether, from the evidence, any reasonable excuse



has been offered. In the case at bar it appears that it was the custom of the railroad company to allow smoking upon the front platform, and that the deceased was smoking, and the jury had a right to consider all these circumstances, as well as the state of the weather and the condition of the streets, in determining the question as to whether the deceased had been guilty of contributory negligence.

Upon the whole case, therefore, we think that the dismissal of the complaint was error, and that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BARRETT, RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

GEORGE KEISTER, Respondent, v. WILLIAM RANKIN, Appellant.

*New trial on the ground of newly-discovered evidence — what evidence justifies it — it may be granted after appeal taken and judgment affirmed — laches.*

The rule which formerly obtained, that where newly-discovered evidence was cumulative a motion for a new trial based thereon should be denied, has been, in furtherance of justice, virtually abolished.

The proper inquiry is whether the newly-discovered evidence, whether cumulative or not, is of such a character that it is likely to produce a different result upon a new trial.

In an action to recover on a *quantum meruit* five per cent on the cost of a building for services rendered by the plaintiff as an architect, in which the plaintiff recovered judgment, the defendant testified that a draft contract handed to him by the architect contained the words "two per cent," and produced on the trial a carbon copy in which the word "two" was inserted in a blank, directly from the ribbon of the machine. The plaintiff testified that when he handed the draft contract to the defendant the word "two" was not inserted, but that there was a blank before the words "per cent." On a motion subsequently made by the defendant for a new trial, upon the ground of newly-discovered evidence, an affidavit of a stenographer, whose name and whereabouts were unknown to the defendant at the time of the trial, was produced, in which she stated that, at the plaintiff's request, she filled in the word "two" in the contract.

*Held*, that the motion should have been granted, as, in view of this statement of the stenographer, the jury might come to an entirely different conclusion from that which they reached, when it appeared that this insertion of the word

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45	373
46	110
146	111

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"two" might have been, and apparently was, made by the defendant after the proposed contract was handed to him;

That such statement of the stenographer was not impeaching evidence assailing the general credibility or otherwise weakening the force of the plaintiff's testimony, as it merely tended to establish a different state of facts from that testified to by the plaintiff, upon which he founded his claim, and thus contradicted, but did not impeach, him;

That the objection that the defendant had been guilty of *laches*, in that he did not make a motion to postpone the trial or to withdraw a juror because of the surprise, was not a valid one, inasmuch as the mere fact that he was surprised, he knowing at the time of the trial nothing concerning the origin of this draft contract, or the manner of its production, or what the stenographer's statement would be in regard to it, afforded no ground whatever on which to move for a postponement thereof; and that the fact that an appeal had been taken and the judgment had been affirmed, afforded no reason why a new trial should not be granted in the interests of justice.

APPEAL by the defendant, William Rankin, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 4th day of August, 1898, denying defendant's motion for a new trial made upon the ground of newly-discovered evidence.

The affidavit of Alice Louise Fleming, read on behalf of the defendant appellant on this motion, contained, among other things, the following statement:

"Deponent, after typewriting the said agreement and making the corrections mentioned, gave to Mr. Keister the said contract as corrected, but with a blank in paragraph marked second on the first page before the word 'per cent.,' reading, 'for full services per cent. upon the actual cost,' and likewise having a blank in the fourth line from the end of the first page before the word 'dollars' so that the contract read 'Upon a proposed cost of          dollars.'

"That on the same day as the completion of the said contract, (Exhibit I), or the day succeeding, Mr. Keister, the plaintiff herein, came to the deponent's desk and requested her to fill in the two blanks aforesaid, and at his direction and while he stood over deponent at her desk, deponent filled in said blanks.

"From deponent's examination of the spaces filled in with the word 'two' and the numbers '350,000,' deponent believes that there has been no erasure in the said blanks since the said contract, Exhibit I,

was typewritten, and that the word 'two' and the numbers '350,000' must have been the word and numbers which Mr. Keister directed deponent at that time to insert in the aforesaid blanks."

*Charles De Hart Brower*, for the appellant.

*Edward A. Hibbard*, for the respondent.

VAN BRUNT, P. J.:

This action was commenced to recover for services as architect in superintending the erection of the Hotel Gerard, and the plaintiff claimed on a *quantum meruit* five per cent on the cost of the building. The defendant alleged an agreement to pay two per cent on the cost. The trial took place in November, 1897, and it appeared that in October, 1893, the defendant requested the plaintiff to draw a contract between them, and the plaintiff thereupon caused to be made two type-written drafts of the contract, one of which was handed to the defendant and the other to a Mr. Moore. The defendant testified that the draft contract handed to him contained the words "two per cent," and produced on the trial a carbon copy in which the word "two" was inserted in a blank directly from the ribbon of the machine. The plaintiff testified that when he handed the draft contract to the defendant the word "two" was not inserted, but that there was a blank before the words "per cent." Although it was admitted that no contract was actually signed between these parties, yet it is claimed upon the part of the defendant that the plaintiff having drawn up the contract in accordance with the terms of their agreement, as stated by him, it necessarily discredited his claim that he was entitled to a different compensation from that which he himself had inserted in his own draft of the contract. The plaintiff testified that the draft was dictated by him to a stenographer, a Miss Fleming, of whose name he was not then certain and whose whereabouts he did not know, although he had made some efforts to find her. The trial resulted in a verdict for the plaintiff, and from the judgment thereupon entered the appellant appealed to the Appellate Division, where the judgment was modified, and as modified affirmed.

Immediately after the trial the defendant made efforts to find the Miss Fleming who had copied the contract. Up to the 1st of July,

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1898, he could find no trace of her, but shortly thereafter he learned that she resided in New York and that her name was Alice Louise Fleming, and on the twelfth of July he procured from her the affidavit forming the basis of his motion for a new trial, which motion was made and denied on the twenty-sixth of July. Thereupon this appeal was taken.

It is urged that the motion was properly denied because the evidence was cumulative; that it was merely an attempt to impeach the testimony of the plaintiff, and also upon the ground of *laches*.

The rule which formerly obtained (for what reason has never been explained), that where newly-discovered evidence was cumulative a motion for new trial based thereon should be denied, has been in furtherance of justice virtually abolished. It seems to be apparent that newly-discovered evidence may be of as much importance upon an issue as to which evidence has been already given, as though no evidence upon that point had been adduced upon the trial. The rule to be applied to such newly-discovered evidence, whether cumulative or not, is: Is it of such a character that it is likely to produce a different result upon a new trial? In the case at bar the evidence is of the highest importance; as, if the jury found that this proposed contract was drawn by the plaintiff with the two per cent inserted therein when he handed it to the defendant, it would certainly tend to show that the facts were not as testified to by him in respect to compensation; and it might very well be that, in view of this evidence, the jury would come to an entirely different conclusion from that which they reached when it appeared that this insertion of the word "two" might have been made and apparently was made by the defendant after the proposed contract had been handed to him.

It is further urged that the motion should be denied because the evidence simply seeks to impeach the testimony of the plaintiff. But the evidence in question is not impeaching evidence within the meaning of the rule. Evidence impeaches a witness when it assails his general credibility or otherwise weakens the force of his testimony and detracts from the weight to be given to it, without having of itself probative value as original evidence upon the matter at issue. Where, as here, it merely tends to show a different state of facts from that testified to by the plaintiff and upon which he

founds his claim, it contradicts, but does not impeach him. If the rule claimed by the plaintiff should prevail, then no newly-discovered evidence could ever be introduced, because it must necessarily, if of any consequence, contradict, and thus in the respondent's view impeach, some witness who has sworn to the contrary.

The next question to be considered is the objection as to *laches*. It is urged that after the plaintiff gave testimony in regard to the condition of this contract, it was the duty of the defendant to make a motion to postpone the trial or to withdraw a juror for surprise. It is difficult to see upon what ground a defendant can withdraw a juror. Nor was there any ground for the postponement of the trial. The mere fact that a party is surprised by the evidence of his adversary affords no ground for a postponement unless he is able to show that he can produce contrary testimony, which from the nature of the case he was not bound to have present at the trial. In the case at bar the defendant knew nothing as to the origin of this draft contract, or the manner of its production, until it was sworn to by the plaintiff at the trial that Miss Fleming had copied the contract. He did not know what Miss Fleming's statement would be in regard to it, and consequently had no ground whatever to move for a postponement of the trial.

It is urged that it is too late to make such a motion after an appeal and the affirmance of a judgment. It is never too late to do justice; and where the ends of justice require that a new trial should be granted the Supreme Court may act, although the case may have been in the Court of Appeals and disposed of there.

We think, therefore, that the court below should have granted the motion for a new trial. The order appealed from should be reversed, with ten dollars costs and disbursements, and the motion granted upon payment by the defendant of the taxable costs in the action, except extra allowance.

BARRETT, RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted upon payment by the defendant of the taxable costs in the action, except extra allowance.

MATILDA E. STARBUCK, as Executrix, and the FARMERS' LOAN AND TRUST COMPANY, as Executor, of the Last Will and Testament of WILLIAM H. STARBUCK, Deceased, Respondents, v. THE PHENIX INSURANCE COMPANY of Brooklyn, N. Y., Appellant.

*Marine insurance — unseaworthiness of the vessel at the commencement of the voyage — it does not preclude a recovery on a time policy.*

Although in the case of a time marine policy of insurance the mere fact that the vessel was unseaworthy at the commencement of the voyage does not necessarily preclude a recovery, yet, in an action brought to enforce the policy, the defendant is entitled to have the jury charged "that, if it appears that a vessel shortly after sailing becomes leaky and unfit to perform her voyage and sinks without encountering any peril or storm, this is presumptive evidence of unseaworthiness of the vessel at the beginning of the voyage."

APPEAL by the defendant, The Phenix Insurance Company of Brooklyn, N. Y., from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 7th day of February, 1898, upon the verdict of a jury, and also from an order entered in said clerk's office on the 28th day of January, 1898, denying the defendant's motion for a new trial made upon the minutes.

*Robert D. Benedict*, for the appellant.

*George H. Adams*, for the respondents.

VAN BRUNT, P. J.:

This case has been twice before the Appellate Division (10 App. Div. 198; 19 id. 139) upon substantially similar evidence, and it is not, therefore, necessary to rehearse again the facts as they were disclosed upon the trial. The learned court upon the last trial of the case in its charge laid down some general rules of law and stated some contentions upon the part of the defendant, but seems to have failed to instruct the jury as to the application of these general rules of law to the case at bar, and also to have omitted to inform the jury as to what should be the result should they find any or all of the contentions of the defendant as to the facts to be well founded.

The learned counsel for the defendant made various requests to charge, but in most of them he failed to recognize the distinction existing between voyage and time policies. The 7th request, however, it would seem that the defendant was entitled to have pre-

sented to the jury in the language in which it was couched. That request was as follows: "7th. That, if it appears that a vessel shortly after sailing becomes leaky and unfit to perform her voyage, and sinks without encountering any peril or storm, this is presumptive evidence of unseaworthiness of the vessel at the beginning of the voyage." That this is a correct rule of law seems to be established by the case of *Van Wickle v. Mechanics', etc., Insurance Company* (97 N. Y. 354), and although the policy sued upon was a time policy, the mere fact that the vessel was unseaworthy at the commencement of the voyage does not necessarily preclude a recovery. As in the case of a voyage policy, the obligation is thrown upon the plaintiff of showing that by reason of active diligence in reference to repairs she is still entitled to recover. By the refusal to charge this request the defendant was deprived of a presumption which the jury were bound to consider. This was an error prejudicial to the defendant, and there must, consequently, be a new trial.

The judgment and order appealed from must be reversed and a new trial ordered, with costs to the appellant to abide event.

PATTERSON, O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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THE AMERICAN BOILER COMPANY, Respondent, v. CHARLES F. FONTHAM, Appellant.

*An order which was not an accepted bill of exchange—defenses between maker and acceptor available to the acceptor against the payee—proof that the acceptor had set up, in another action by the maker, the acceptance of the order, does not establish an estoppel.*

An instrument in the following form:

"NEW YORK, July 20, 1895.

"CHARLES F. FONTHAM,

"105 West 95th St., City:

"DEAR SIR.—Please pay to the American Boiler Company, No. 94 Center street, city, the sum of One hundred eighty-seven and 15/100 (\$187.15) dollars, and charge the same to my account on heating contract at 64 West 99th street, and oblige,

"Yours respectfully,

"H. J. APGAR.

"Accepted, and I agree to pay the sum specified herein within sixty days from date.

"CHARLES F. FONTHAM,

"105 West 95th."

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is a mere order on a fund and is not an accepted bill of exchange, and in an action brought thereon by the payee against the acceptor, the latter has the right to show that there was nothing due under the heating contract to the drawer of the order.

The fact that, in an action upon the heating contract, brought by the drawer of the order against Fontham, for moneys alleged to be due thereunder, Fontham set up the acceptance of this order as a payment is not sufficient to establish a right on the part of the American Boiler Company to recover upon such instrument, unless it is made to appear that in that action this sum had actually been charged as a payment on account of a sum which had been found due to the drawer of the order under the heating contract.

APPEAL by the defendant, Charles F. Fontham, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 16th day of March, 1898, upon the verdict of a jury rendered by direction of the court, and also from an order bearing date the 16th day of March, 1898, and entered in said clerk's office, denying the defendant's motion for a new trial made upon the minutes.

The action was brought to recover upon the following instrument:

"NEW YORK, *July 20, 1895.*

"CHARLES F. FONTHAM,

"105 West 95th St., City:

"DEAR SIR.—Please pay to the American Boiler Company, No. 94 Center Street, city, the sum of One hundred eighty-seven and 15/100 (\$187.15) dollars, and charge the same to my account on heating contract at 64 West 99th street, and oblige,

"Yours respectfully,

"H. J. APGAR.

"Accepted, and I agree to pay the sum specified herein within sixty days from date.

CHARLES F. FONTHAM,

"105 West 95th."

*Thomas Stevenson*, for the appellant.

*Franklin Pierce*, for the respondent.

VAN BRUNT, P. J.:

We think that the learned court below erred in treating the paper referred to in the complaint as an accepted bill of exchange. It had none of the elements of a bill of exchange, and showed upon its face that it was a mere order to pay money out of the sums which



might become due to the drawer of the order on a heating contract which he had with the acceptor of the order. This evidently was the theory upon which the action was brought, the plaintiff having alleged that moneys had become due under the contract, and that the order was drawn against the same and accepted by the defendant, there being no other consideration for the defendant's promise. This being the case, the defendant clearly had the right to show that there was nothing due under the contract to the person who had drawn the order. All the defenses which existed between the drawer of the order and the defendant were available upon an action to enforce what is simply an assignment of a portion of the moneys which might become due under the contract.

The allegation in the complaint, that in an action brought by the drawer of the order against the defendant upon the contract for moneys alleged to be due thereunder, the defendant set up the acceptance of this order as a payment, was incomplete unless it was made to appear that in that action this sum had actually been charged as a payment on account of a sum which had been found due to the drawer of the order under the contract.

The cases of *Gibson v. Lenane* (94 N. Y. 183) and *McCorkle v. Herrman* (117 id. 297) in no way conflict with this view. All that they hold is that an order of this kind must, as between the parties to the contract, be treated as a payment on account of what is found to be due under the contract. Of course if there is nothing due upon the contract, then there is no fund against which the order can be charged. The defendant in this case had a right to prove that the drawer of the order had failed to perform his agreement and that nothing had become due to him under the contract.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to appellant to abide event.

PATTERSON, O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

## ALEXANDER KEEGAN, Respondent, v. THE THIRD AVENUE RAILROAD COMPANY and JOHN HUNT, Appellants.

*Negligence — passenger injured in a collision in which a street railroad car is run into by a wagon — liability of the railroad company — when it is the duty of a railroad company to use the highest degree of care — objection to testimony competent as to one of several defendants.*

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	a165	a822
	34	297
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d 78	84	297
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	34	297
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A street railroad company is not necessarily freed from liability to a passenger injured in a collision between one of its cars and a wagon, because the wagon struck the car instead of the car striking the wagon.

The question whether a street railroad company is called upon to exercise "great care and vigilance, all that human foresight might suggest," depends upon the conditions existing at the time.

Where an action is brought against two defendants having conflicting interests, an objection to a question tending to elicit a fact material as against one of them is not well taken. If the answer is incompetent and prejudicial to the other defendant, a motion to strike it out should be made and an exception taken to the denial thereof.

VAN BRUNT, P. J., dissented.

APPEAL by the defendants, The Third Avenue Railroad Company and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of February, 1898, upon the verdict of a jury for \$3,000, and also from an order entered in said clerk's office on the 7th day of March, 1898, denying the defendants' motion for a new trial made upon the minutes.

*Eugene Treadwell*, for the Third Avenue Railroad Company, appellant.

*William C. Beecher*, for the respondent.

BARRETT, J. :

The action is for negligence. The plaintiff was injured on August 30, 1894, while riding on one of the defendant company's open cars, south bound. He was sitting on the easterly side of the car near the rear. Some little distance south of Fifty-eighth street this car met a wagon belonging to the defendant Hunt, which was coming north on the easterly track. Behind the wagon was a north-bound car.

In attempting to get out of its way the wagon crossed to the west, and, as the great preponderance of evidence shows, collided with the rear of the south-bound car, striking and injuring the plaintiff.

We think the issues of negligence and freedom from contributory negligence were for the jury. The undisputed evidence shows that the gripman of the south-bound car ran across Fifty-eighth street at the full speed of the cable, and the driver of the wagon was plainly negligent in attempting to cross in front of it. There is also abundant evidence to show that the driver first started to cross while the car was still about seventy-five feet away. If the gripman had been keeping a proper lookout, he would have observed this attempt and slackened his speed. He was not absolved from blame because the wagon struck the car instead of the car striking the wagon. A heavy wagon like the one in question could not stop at once, and there was evident danger in its movement toward the west track, even though it did not get over soon enough to receive the direct blow of the car. A defendant company has often been held liable, although its own car was the one struck in the collision. (*Hurley v. N. Y. & Brooklyn Brewing Co.*, 13 App. Div. 167; *Loudoun v. Eighth Avenue R. R. Co.*, 16 id. 152.) We need not dwell further upon the facts, or upon the questions of law connected therewith.

Apart from their consideration, the main question of law presented upon this appeal is as to the correctness of the learned trial judge's charge in a single particular. After adverting to the fact that the plaintiff was a passenger upon the defendant company's car at the time of the accident, he stated the rule of law by which the jury should be governed in the following words:

"Now there is perhaps some difference in the obligation which rested upon the servants of the two defendants *immediately prior to the happening of this* accident. The plaintiff was a passenger upon the car of the defendant, the railroad company. In such cases the law says that while the company is not to be considered as an insurer of its passengers' safety against all possible injuries, yet that it is bound to use a high degree of skill and vigilance to guard against accidents from which its passengers may suffer injuries, and that it has not fulfilled this duty unless it has used the utmost care and diligence which human skill and foresight will suggest."

This was subsequently accentuated when the learned judge specifi-

cally charged the two following propositions as requested by the plaintiff :

"That the responsibility of a common carrier of passengers is such as to require a high degree of care for their safety, and the discharge of this duty requires of such a carrier the exercise of all the care and vigilance that human foresight may suggest to secure the safety of its passengers. \* \* \*

"If it was possible by the exercise of great care and vigilance, all that human foresight might suggest, for the gripman to have avoided the collision and consequent injury to plaintiff, and he failed to use such care and vigilance, then he was negligent, and the railroad was responsible for the consequence to plaintiff."

To the charge as thus made the defendants duly excepted.

We think this charge was correct, and that the defendants' exceptions thereto were not well taken. Indeed we would have had no doubt upon the subject but for the view which the learned counsel for the appellants takes of the decision of the Court of Appeals in the late case of *Stierle v. Union Railway Company* (156 N. Y. 70). The trial judge's charge was in accordance with what we understand to be the settled rule of law in this State applicable to the facts here presented to the jury. (*Bowen v. N. Y. C. R. R. Co.*, 18 N. Y. 408; *Brown v. N. Y. C. R. R. Co.*, 34 id. 404; *Maverick v. Eighth Ave. R. R. Co.*, 36 id. 375; *Barrett v. Third Ave. R. R. Co.*, 45 id. 628; *Taber v. D., L. & W. R. R. Co.*, 71 id. 489; *Coddington v. Brooklyn Crosstown R. R. Co.*, 102 id. 66.) It is claimed that the rule in question is not applicable to street cars drawn by horses or propelled by a cable; and *Unger v. Forty-second Street R. R. Co.* (51 N. Y. 497) is cited in support of this contention. It will appear, however, from an examination of that case that the plaintiff there was not a passenger upon the defendant's road. She was simply a pedestrian who was injured by the defendant's horses, which had broken loose from the car, and were running away. Judge EARL's observations upon the degree of care which the defendants were there called upon to exercise had relation to these facts and to these only. That he did not intend to modify the general rule with regard to the degree of care required in the protection of passengers is apparent from what follows his discussion of the rule applicable to the pedestrian plaintiff. "But whatever degree of

care," he says (p. 502), "may be required of street railway companies, *as to the passengers which they carry*, their cars are no more dangerous to pedestrians in the street than carriages, omnibuses or any other vehicles drawn by horses." We may assume, therefore, that no special exemption from the wholesome general rule which has for many years continuously prevailed in this State was intended to be granted to any particular class of carriers of passengers.

We have also carefully examined the *Stierle Case* (*supra*), and we find nothing in Judge GRAY's opinion to justify the claim of the present appellant. What we understand to have been decided in that case is simply that the general rule to which we have adverted was not applicable to its particular facts. The accident there occurred while the driver of the defendant's car was changing his car from one track to another over a switch, in order to cross a bridge. This presented no situation of danger, and called for no special exercise of extreme vigilance. No accident could have been apprehended from such an act. It was almost routine work. It called, of course, for reasonable care. Every act of the driver of a car, however simple and ordinary, calls for that. Where, however, there is nothing whatever in the surroundings to evoke the slightest sense of danger, the degree of care required is simply that which is commensurate to the existing conditions. A rule which called upon every driver or motorman, at all times and under all circumstances, to keep himself keyed up to the highest pitch of vigilance would be senseless. He should never, it is true, be heedless or forgetful of his duty. He should, in fact, at all times be watchful and prepared for emergencies. When, however, the law imposes upon him a still higher degree of care, namely, the exercise of all the vigilance that human foresight can suggest, it naturally refers to conditions calling for that extreme degree of vigilance. It is not so unreasonable, *par example*, as to demand constantly strained eyes from the lookout over a perfectly clear horizon.

In the original opinion in the *Stierle* case the court, in its general language, apparently limited the obligation of carriers of passengers to exercise the highest degree of care which human prudence and foresight can suggest to unsafe appliances. That, however, it was not intended to thus limit the rule was clearly and emphatically stated in the opinion on the motion for a reargument. (156 N. Y.

684.) Indeed, it was there said that the strict rule "would be proper in a case where the accident resulted from a situation from which grave injury might be expected and which, therefore, imposed upon the carrier's servants the duty to exercise the utmost skill and foresight to avoid it." Judge GRAY referred, with approval, to the *Maverick* and the *Coddington Cases* (*supra*), and said that the application of the strict rule of duty in the former case was warranted by the situation. The situation in the present case was just as obviously a dangerous one as was that in the *Maverick* case.

It should be observed, too, that in his general charge the learned trial judge explicitly confined the propositions above quoted to the particular situation "immediately prior to the happening of this accident." He also observed, when speaking of the gripman's duty, that it commenced at the time Hunt's driver began to swing his cart across the westerly track. It seems quite clear, therefore, that, taking the charge in its entirety, the strict rule was laid down solely with regard to the conditions existing at the moment when the danger became obvious, and that the jury could not possibly have been misled into applying it to other and less grave conditions. The charge, as a whole, was thus within the principle stated in the *Stierle* case as explained in the opinion upon the motion for a reargument.

There is only one other exception which calls for special consideration. The plaintiff, upon his redirect examination, testified to admissions made to him by the defendant Hunt with respect to the latter's ownership of the wagon and as to the driver's agency. Thereupon Hunt's counsel cross-examined the plaintiff with regard to the conversation in which Hunt was said to have made the admissions. The plaintiff replied to Hunt's counsel that he did not exactly remember what Hunt had said. The cross-examination then proceeded as follows: "Q. How did you come to state to your own counsel what he said and you can't recall it when I ask you the question? A. I remember what he said to another person; I don't know what other person was there. Q. What did he say to this other person? A. He was describing the accident. Mr. Lauterbach: That is objected to as irrelevant, incompetent and immaterial and not evidence against the defendant, the Third Avenue Railroad Company. The Court: I am obliged to take it as against the other defendant. [Exception taken by counsel for the Third Avenue

Railroad Company.] Q. What did he say to this other person?  
A. To the best of my knowledge he said that his cart was going uptown and the car struck him and knocked the horse down and the shaft broke in two and hit me in the head. That is, Hunt said that."

The question here put to the plaintiff by Hunt's counsel was proper, and the objection of the defendant company was not well taken. The plain object of the question was to weaken or neutralize Hunt's admissions as testified to by the plaintiff on his redirect examination. It was perfectly competent as against Hunt. As put, it apparently had no bearing whatever upon the defendant company. The answer as given, however, was plainly prejudicial to the latter. That, then, was the time when the defendant company should have objected. If it had asked to strike out the answer, we cannot doubt that its application would have been granted. Instead of that it relied upon its untenable exception to a question which was proper as against Hunt, and which called for no such answer against it as was given.

The judgment and order appealed from should be affirmed, with costs.

RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

Judgment and order affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. SEVERIN WARSCHAUER, Appellant, v. WILLIAM DALTON, as Commissioner of Water Supply of the City of New York, Respondent.

*City of New York*—an inspector of water supply to shipping is not a "regular clerk"—application, by such inspector, for reinstatement—conclusion in his application that he is only subject to removal for cause.

An inspector of water supply to shipping in the department of public works of the city of New York appointed in September, 1895, is not a "regular clerk," and may be removed without a trial, hearing or an opportunity for an explanation.

Where, in an application by such inspector to be reinstated, his duties are not disclosed, a conclusion, following the statement of the relator's office, that "said office or position was and is that of a regular clerk, and was and is in the classi-

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fied civil service, \* \* \* and the which said office or position petitioner was and is entitled to continue to hold, subject only to removal for cause, or to abolish unnecessary positions," cannot be sustained.

APPEAL by the relator, Severin Warschauer, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 7th day of October, 1898, denying his motion for a peremptory writ of mandamus directing William Dalton, as commissioner of water supply of the city of New York, to reinstate the relator in his position as inspector of water supply to shipping in the department of water supply; or, in the alternative, for a writ of certiorari to review the determination of the said William Dalton, as commissioner of water supply of the city of New York, in regard to the removal of the relator from his position in said department.

*W. R. Spooner*, for the appellant.

*Terence Farley*, for the respondent.

BARRETT, J. :

The relator was appointed an inspector of water supply to shipping in the department of public works in September, 1895. He was assigned to the same position in the department of water supply under the new charter, and was removed by the respondent in June, 1898, without trial, hearing or an opportunity for explanation. He contends that he was subject only to removal for cause.

It was held in *People ex rel. Bowers v. Dalton*, affirmed by this court (31 App. Div. 630), upon the opinion of Mr. Justice FREEDMAN at Special Term (23 Misc. Rep. 294), that a "foreman of repairs," transferred as was this relator, could be removed by the respondent at pleasure. In his opinion in that case, Mr. Justice FREEDMAN reviews the Constitution, the civil service rules and the provisions of the new charter, and holds that no right to trial or hearing is given. We think the present case is governed by this decision. The only difference between the cases is that here the relator claims for the position of "Inspector of Water Supply to Shipping in the Department of Water Supply" the attributes of a clerkship. He does not, however, state the facts upon which his conclusion rests — for, plainly, his assertion on that head is of a



conclusion and not of a fact. This is apparent from the language of his petition. After there alleging the real facts as to his original appointment under the charter of the former city of New York, and his subsequent assignment to a similar position under the new charter of the present city, he concludes as follows: "Whereby and by reason whereof petitioner, on the 1st day of January, 1898, became and thereafter continued to be, and notwithstanding the determination hereinafter complained of, still lawfully is, Inspector of Water Supply to Shipping in the Department of Water Supply, *the which said office or position was and is that of a regular clerk*, and was and is in the classified civil service \* \* \* and the which said office or position petitioner was and is entitled to continue to hold, subject only to removal for cause, or to abolish unnecessary positions." The characterization here of the inspectorship is but a part of the petitioner's general conclusion from the preceding facts. It is in no just sense a statement of an independent fact. Whether the relator is or is not a regular clerk depends upon the nature of his duties. These duties are not here disclosed, and in the absence of a distinct statement on that head the relator's conclusion that the duties of an inspector of water supply to shipping are those of a regular clerk cannot well be sustained.

It was held in *People ex rel. Sims v. Fire Commissioners* (73 N. Y. 437) that the term "regular clerk," in the section of the former charter, upon which that under consideration is founded, was used in the popular sense; that is, as applicable to persons employed in one of the departments to keep the records or accounts, and that it does not apply to subordinate ministerial officers, although in the performance of their duties, or as an incident thereto, they may render some service which might have been performed by a clerk. This rule was subsequently followed, and held to be applicable to a superintendent of telegraph appointed by the fire commissioners (*People ex rel. Emerick v. Board of Fire Commissioners*, 86 N. Y. 149); to a roundsman in the department of docks (*People ex rel. McCullough v. Cram*, 72 N. Y. St. Repr. 266), and to a sanitary inspector of the board of health (*People ex rel. Archbold v. Health Department*, 24 Wkly. Dig. 197). There can be no doubt that it equally applies to an inspector of water supply to shipping.

It is also claimed that the respondent did not enter the true

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grounds for the relator's discharge upon the records of his department, nor file therein a statement showing the reasons therefor, nor transmit notice thereof to the *City Record* for publication therein. It was held in *People ex rel. Woltman v. Myers* (10 N. Y. Supp. 815) that the failure of a head of department to accurately comply with the statute in one of the latter particulars did not vitiate a removal which was made for cause after an opportunity for explanation. It certainly does not vitiate a removal "at pleasure."

The order appealed from should be affirmed, with costs.

VAN BRUNT, P. J., RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order affirmed, with costs.

WINTHROP A. CHANLER, Respondent, v. THE NEW YORK ELEVATED RAILROAD COMPANY and THE MANHATTAN RAILWAY COMPANY, Appellants.

*Will*—an absolute power of sale is not limited by the suggestion of a time for its exercise—effect of the time of its exercise not being limited by lives—its exercise postponed for the convenience of the estate—legacies vested, although not bequeathed by direct gift—equitable relief to an abutting owner who has conveyed and afterwards regains the title.

Where an absolute power of sale is conferred upon an executor, the addition of words suggesting a time for its exercise or indicating the testator's desire in that regard do not restrain or limit the action of the executor.

The fact that an executor may require, in order to make a sale under such a power, a period of time not measured by lives in being, does not suspend the power of alienation; and, in such a case, a trust to receive the rents and profits pending the sale for the benefit of beneficiaries is not illegal.

Where the postponement of the distribution of an estate is for the convenience of the estate to enable the executors advantageously to convert the property, and the rents, income and profits accruing between the time of the testator's death and the time of distribution are given to the several legatees, to be paid semi annually, in proportion to their interests in the *corpus* of the fund, the presumption against the vesting of the legacies arising from the fact that there is no direct gift, but only a direction to pay over at a future time, is rebutted.

Under the provisions of a will by which separate funds are created out of the proceeds of sale of the real estate left by the testator and are directed to be set apart and held for the benefit of certain persons who are respectively to receive the income from the respective funds until the time of actual distribution, the title to the fund set apart for any beneficiary vests at once.

An owner of property, abutting upon a street upon which an elevated railroad has been constructed, who conveys it, loses his right to equitable relief, and the railroad company, defendant in an action brought by such owner for an injunction and damages because of the construction of the railroad, is entitled to a jury trial of the question of past damages, but when the owner regains his title to the property he regains also his right to have all the questions presented by such action settled by a court of equity.

A cause of action which equity will enforce as an incident to equitable relief need not necessarily be one which has been such an incident throughout.

The proof, as to the actual rents received from such property, which is sufficient to justify a recovery, considered; and here held to be insufficient.

APPEAL by the defendants, The New York Elevated Railroad Company and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 11th day of February, 1898, upon the decision of the court rendered after a trial at the New York Special Term.

*William H. Godden*, for the appellants.

*Charles H. Strong*, for the respondent.

BARRETT, J.:

This is the usual action for an injunction and damages, the properties affected being Nos. 358, 419 and 428 Third avenue. The first point raised by the defendants is, that the plaintiff did not prove a good title to No. 358. Maria Adams died seized of this property in 1881, and her executor conveyed it to the plaintiff in 1885. By the 5th clause of her will the testatrix devised and bequeathed her residuary estate, which included this property, to her executor in trust to collect the rents and profits until a sale, and distribute them among five individuals named. The will then reads, "And upon the further trust to sell and dispose of said real estate as soon as he can sell and dispose of the same to advantage and best interest of my estate, but it is my desire that the real estate remain unsold until the expiration of five years after my decease unless in the opinion of my executor hereinafter named my estate will be benefited by an earlier sale, and in trust further upon the sale of said real estate to pay one-fifth part of the net proceeds to Mary E. Adams, in case I shall continue to live with her and be taken care of by her until my decease, one-fifth part to Aaron Adams, in trust further to invest the other three-fifths of the net proceeds in

lawful securities, one of said three-fifths for the benefit of my said son, another of said three-fifths for the benefit of my said daughter, and the other of said three-fifths for the benefit of my said granddaughter. The principal so invested for my son and daughter is to be paid to them in ten equal annual installments, together with the net income thereon or the unpaid installments thereof as often as annually. The principal of the share of my granddaughter is to be paid to her when she is twenty-one. The income thereof at that time is to be paid to her or her mother for her as often as annually," etc. The recipients of the proceeds were the same persons to whom the income was to be paid pending sales. It is said that these provisions illegally suspend the power of alienation.

It is well settled that where an absolute power of sale is conferred upon an executor, the addition of words suggesting a time for its exercise, or indicating the testator's desire in that regard, do not restrain or limit the action of the executor. (*Deegan v. Wade*, 144 N. Y. 573 ; *Robert v. Corning*, 89 id. 225 ; *Henderson v. Henderson*, 113 id. 1.) This rule has been applied to words much more peremptory than those in the case at bar. (*Deegan v. Wade*, *supra*.) The fact that an executor may require, in order to make a sale, a period of time not measured by lives in being, does not suspend the power of alienation ; and in such a case a trust to receive the rents and profits pending sale for the benefit of beneficiaries is not illegal. (*Robert v. Corning*, *supra*.)

But it is said that the disposition of part, at least, of the proceeds of sale was illegal, and invalidated the power conferred upon the executor. Without considering the latter question, we think it clear that the disposition of the proceeds was valid. The facts as to the first two-fifths are precisely like those in *Robert v. Corning*, where it was said : " The postponement of the distribution, which was contemplated, was for the convenience of the estate to enable the executors advantageously to convert the property, and the rents, income and profits which might accrue between the time of the testator's death and the time of distribution were given to the several legatees to be paid semi-annually, in proportion to their interests in the *corpus* of the fund. These circumstances are regarded as rebutting the presumption against the vesting of legacies, arising from the fact that there is no direct gift, but only a direction to pay over

at a future time. The postponement of the payment, where it is made for the convenience of the estate, is consistent with the vesting of the legacies, and the gift of the intermediate income indicates an intention to vest the *corpus* from which the income is to be derived." (89 N. Y. 240, 241.)

Aaron and Mary Adams thus obtained vested interests. We think the same is true of the testator's son, daughter and granddaughter. In this case, as in the other, the intention to convey a vested interest is shown by the gift of the income. The actual payment is postponed for a longer period, and this postponement is not for convenience of distribution. But three separate funds are created out of the proceeds of sale, which are to be set apart and held for the benefit of these three persons, and of which they are to receive the income until the actual distribution. Where a fund is thus created and devoted to the use of the beneficiary his title vests at once. (*Warner v. Durant*, 76 N. Y. 133.) The rules cited show, in conjunction, that the beneficiaries obtained a vested interest from the date of the death of the testatrix.

It is next said that the defendants were entitled to a jury trial of the question of the rental damage sustained by No. 419 Third avenue prior to March 12, 1891. It appears that on this date, which was subsequent to the bringing of the suit, the plaintiff conveyed the premises to one Simonson, who placed a mortgage thereon and on the same day reconveyed them to the plaintiff, who has ever since been the owner thereof. It is evident that the transfer was merely nominal and without consideration and that the reconveyance was practically simultaneous, but we shall treat the case as though the sale were a *bona fide* one and the vendee had been in possession for an appreciable period. It has been held that where the owner of property conveys it, he loses his right to equitable relief and the defendant becomes entitled to a jury trial of the question of past damage. (*Saxton v. N. Y. Elevated R. R. Co.*, 12 App. Div. 263; *Hutton v. Met. Elevated R. Co.*, 19 id. 243.) But it has never been held that the original owner does not regain his right to have the whole question settled by a court of equity when he regains his title to the property. It is said that the right to equitable relief once lost can never be regained, but neither reason nor authority is given in support of such a view. It has often been held that equity

adapts its relief to the state of facts appearing upon the trial, and we see no reason for refusing to apply that rule to a case like the present.

It is said that the cause of action which equity will enforce as an incident to equitable relief must be one which has been such an incident throughout. But this is not so. In the case of *Hunter v. M. R. Co.* (141 N. Y. 281) the plaintiff was originally a tenant in common of the land, but before bringing suit she bought the interests of her co-tenants and obtained an assignment of their claims for past damages. She was permitted to recover in full in equity. The court said: "When the plaintiff brought her action she represented in her person every interest in the property, and if she were found and should be adjudged to be entitled to the equitable relief she demanded, in the exercise of the jurisdiction which it had acquired over the action, the court would have the right to assess the damages down to the time of trial. \* \* \* If they, as matter of fact and of law, then belonged to the plaintiff, of what consequence is it that they were not, during all the time for which they were awarded, hers to recover?" Plainly the causes of action for past damages there assigned to the plaintiff were never an incident to her title, for at the time they accrued she did not own the whole property and they did not vest in her by virtue of her subsequent purchase. If equity will enforce a cause of action for rental damage which was *never* incident to the right of ownership, certainly it may enforce one which was originally thus incident, but which ceased to be so temporarily by reason of the conveyance of the property. We think the true rule is that, where the plaintiff is the full owner, equity will enforce any cause of action in the premises, legal or equitable, which was vested in him when he brought his suit.

We have carefully examined the evidence on which the awards are based. Most of them are amply sustained. We do not, however, find sufficient evidence of rental damage to No. 419. There is no evidence in the case from which it can be determined what rent was received for the property in any year prior to 1894. The only witness on the subject is Mrs. Carroll. She and her husband moved into the premises in July, 1877, when the building was just completed. She testifies that tenants followed rapidly, and gives the amounts received for certain of the rooms. She makes no attempt, however, to tell how much of the building was occupied.

She testifies that the rent was "reduced some" when she left in 1885, and says: "I guess it was about \$17 for the apartments adjoining mine, the front; it was as much as that anyway. It was one dollar less as you went up to the top." She adds that she cannot tell the time of the reduction. It is quite impossible to ascertain from this evidence how much was received from the building in 1877 or any subsequent year, or what the gross reduction was, or when that reduction was made. It may have been long after the building of the road; and, in fact, the testimony seems to show that it was at least two years thereafter. From the time Mrs. Carroll left there is no evidence at all as to the rents received down to 1894. We are informed what the two stores brought in 1894 and 1895, and that the whole premises rented for \$2,500 in 1897. But there is nothing with which to compare these figures. We know of no case where an award has been allowed to stand upon such proof. The plaintiff must show a loss of rents due to the presence of the road or a failure to realize as great a sum as he would have but for this cause. But here the evidence does not either show a loss or negative a proper gain. The fundamental basis of the claim is unproven. The defect is not supplied by the opinion of the plaintiff's expert that the rental value of the stores was \$900 a year in 1877. This opinion cannot take the place of the actual fact as to what the rent was. This fact was simple and capable of direct proof, and opinion evidence as to what should have been realized cannot be taken as a substitute.

The evidence of diminution of the fee value of No. 419 is not very satisfactory, but on the whole we think it was sufficient to support the award.

The judgment should be modified by deducting the sum of \$3,379.42, the amount awarded as rental damage to No. 419 Third avenue, and as thus modified affirmed, without costs of this appeal to either party.

VAN BRUNT, P. J., RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment modified by deducting therefrom \$3,379.42, amount awarded as rental damage to No. 419 Third avenue, and as thus modified affirmed, without costs.

THOMAS KENNEDY, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

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*City of New York*—failure to file with the corporation counsel notice of an intention to bring an action against the city—what does not excuse or waive such failure.

The failure of the plaintiff, in an action against the city of New York to recover for personal injuries caused by the defendant's alleged negligence, to allege in his complaint the filing with the corporation counsel of a notice of intention to bring the action, as required by chapter 572 of the Laws of 1886, is not excused by proof that, after the expiration of the statutory period and when the plaintiff's right to bring an action was foreclosed, a stipulation was entered into between his attorneys and the corporation counsel, whereby it was agreed that the service of his summons and complaint might be made before his examination on behalf of the city comptroller, and that the city would not object to the bringing of the suit prior to such examination. Such conduct was not a waiver by the city of its right to notice.

*Quare*, as to the right of the corporation counsel to waive the filing in his office of the statutory notice.

APPEAL by the plaintiff, Thomas Kennedy, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 2d day of November, 1896, upon the dismissal of his complaint by direction of the court after a trial at the New York Trial Term; also from an order made at the New York Trial Term and entered in said clerk's office on the 28th day of October, 1896, denying the plaintiff's motion for a rehearing of the defendant's motion at Trial Term which resulted in the dismissal of the plaintiff's complaint, and for leave to amend the complaint.

*Robert C. Taylor*, for the appellant.

*Theodore Connolly*, for the respondent.

BARRETT, J. :

The action was for personal injuries claimed to have been caused by the defendant's negligence. The plaintiff failed to allege in his complaint the filing with the corporation counsel of a notice of intention to bring the action, specifying the time when and place where the injuries were received, as required by chapter 572 of the Laws of 1886. Because of the failure to so allege, the complaint was dis-



missed at the trial upon motion of the defendant's counsel. The dismissal was right, and the judgment must be affirmed upon the authority of *Babcock v. The Mayor* (56 Hun, 196), *Missano v. Mayor* (17 App. Div. 536), and *Sheehy v. City of New York* (51 N. Y. Supp. 519). The appellant concedes that the *Missano* case is adverse to his main contention, but he insists that the provisions of the statute in question were substantially complied with; that the corporation counsel waived all irregularities as to the form of the notice; and that his motion for a rehearing and for leave to amend should have been granted. We think, however, that the denial of this motion was also right. The non-compliance with the statute was substantial and radical. There was no attempt either in form or substance to satisfy its requirements. No notice of any kind was filed with the corporation counsel. No intention to commence an action against the city was even expressed in the notice filed with the comptroller — though we do not mean to intimate that that would have sufficed. In the correspondence between the plaintiff's attorney and the assistant corporation counsel with respect to the plaintiff's examination as required by the comptroller, there are expressions suggestive of an impending action against the city, and from which it might be inferred that the plaintiff was about to bring such an action. But this clearly is not the kind of notice which the statute requires. It further appears that, after the expiration of the statutory period and when the plaintiff's right to bring an action was foreclosed, a stipulation was entered into between his attorneys and the corporation counsel whereby it was agreed that the service of his summons and complaint might be made before his examination on behalf of the comptroller, and that the city would not object to the bringing of the suit prior to such examination. This stipulation neither added to nor took from the rights of the parties as they then existed under the law. It certainly did not waive the notice required by the statute. It was said in the *Sheehy* case that the law did not give the corporation counsel the right to waive the filing in his office of the statutory notice. But even if it did give that right, it was not here exercised. The plaintiff, undoubtedly, acted throughout as though he intended to commence suit. The trouble is that he did not express this intention as required by the statute. The filing of this statutory notice with the corporation

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counsel was a condition precedent to the bringing of the action. The plaintiff failed to fulfill that condition, and consequently the granting of his motion for a rehearing, or for leave to amend, could have done him no possible good.

The judgment and order appealed from should, therefore, be affirmed, with costs.

VAN BRUNT, P. J., RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order affirmed, with costs.

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THE PEOPLE OF THE STATE OF NEW YORK ex rel. WILLIAM H. CUNLIFFE, Appellant, v. J. SERGEANT CRAM and Others, Commissioners of Docks of the City of New York, Respondents.

*Discharge of a veteran, an inspector of the dock department of the city of New York — when unauthorized.*

An honorably discharged Union soldier who, in October, 1874, entered the employment of the dock department of the city of New York as an expert painter, and in October, 1875, was appointed an inspector of painting and general repairs, and continued to be such up to October, 1894, when he was discharged by a resolution of the dock commissioners, who knew that he was an honorably discharged Union soldier, he being at the time actually employed in supervising a particular piece of work, then uncompleted, and there being other work to be performed by the department of the character of that upon which he had previously been engaged, which, since his discharge, had actually been performed by employees of the department who were not honorably discharged Union soldiers, is entitled to be reinstated under the provisions of chapter 716 of the Laws of 1894.

The effect of the act of 1894 was not merely to bring veterans, when engaged in State work done in cities, within the purview of the general statute; it covers all public works of the cities of the State, whether municipal or governmental, and was intended to extend the protection afforded to veteran appointees by chapter 577 of the Laws of 1892, relating to cities, to all employees, whether in receipt of a definite salary, or compensated for their labor by daily wages.

Chapter 716 of the Laws of 1894 and chapter 577 of the Laws of 1892 are *in pari materia* and should be construed together.

The act of 1892 limited the power of removal of salaried appointees to cause shown after a hearing had, while the act of 1894 limited such "cause" to incompetency and conduct inconsistent with the position.

APPEAL by the relator, William H. Cunliffe, from a judgment of the Supreme Court in favor of the defendants, entered in the office of the clerk of the county of New York on the 25th day of March, 1898, upon the dismissal of an alternative writ of mandamus by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 23d day of March, 1898, upon which said judgment was entered.

*Robert B. Honeyman*, for the appellant.

*Theodore Connolly*, for the respondents.

BARRETT, J. :

The writ was dismissed at the trial upon the relator's opening, the learned trial judge holding that the allegations of the writ were insufficient to constitute any cause of grievance against the respondents. The relator alleges that he is an honorably discharged Union soldier; that on or about the 30th day of October, 1874, he entered the employ of the dock department as an expert painter; that on October 18, 1875, he was appointed also as an inspector of painting and general repairs, and that he continued in the employ of the department up to the 31st day of October, 1894, when he was discharged by a resolution in the following words :

" *Resolved*, That William H. Cunliffe, William C. Rogers and George N. Baker, painters, be and hereby are honorably discharged from the service of this department, to take effect November 1st, 1894, pursuant to the provisions of the Saxton Bill."

The relator also alleges that during the entire period of his employment he was continuously occupied as such employee, and at all times performed his work to the entire satisfaction of the department. The details of his continuous service are fully set forth. He also alleges that at the time of his discharge he was actually employed in supervising a particular piece of work, which would have required for its completion about two weeks more time; that there was, down to the date of the writ, work to be performed by the department of the character upon which he had previously been engaged; that since his discharge such work had actually been performed by the department, and that other men who were not honorably discharged Union soldiers had been employed to perform such

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work. He finally alleges that the respondents, when they removed him, knew that he was an honorably discharged Union soldier, and that he personally appeared before the board and demanded reinstatement or re-employment, which was refused.

The facts here averred brought the relator's case within the provisions of chapter 716 of the Laws of 1894. This act, which was in force at the time when the relator was discharged, in terms embraces all the cities, towns and villages of the State. It provides that *in all cases* the person having the power of employment or appointment, unless the statute provides for a definite term, shall have the power of removal only for incompetency and conduct inconsistent with the position held by the employee or appointee. The claim is made that, because, at the time of the passage of this act, chapter 577 of the Laws of 1892 was in full force and effect, and this latter chapter in some degree protected veterans holding positions by appointment in cities, it was not intended by the act of 1894 to make further provision for their protection when employed in strictly corporate work, but only to bring them, *when engaged in State work done in cities*, within the purview of the general statute. We see no reason for thus limiting the operation of the general act of 1894. It is broad enough to cover all public works of the cities of the State, whether municipal or governmental. It is apparent from the reading of the two acts that the intention was to extend the protection afforded to veteran appointees by the act of 1892, relating to cities, to all employees, whether in the receipt of a definite salary, or compensated for their labor by daily wages. We quite agree with the respondents that the two acts are *in pari materia* and should be construed together. But what then? The act of 1892 merely provides that no person holding a position by appointment, or who may hereafter be appointed, in any city or county of the State, receiving a salary from such city, who is an honorably discharged soldier, shall be removed from such position except for cause shown after a hearing had. This did not give the veteran any right to preferential appointment or employment. In securing an appointment or employment he was still upon equal terms with all other citizens. It was only after he had secured appointment, with a fixed salary, that the act shielded him. The act of 1894, however, grants to the veteran the full measure of the

people's favor. Its protection is not limited to a mere shield against removal. It distinctly and broadly provides for preferential appointment and employment. It also defines the cause for which alone the veteran, after securing his preferential appointment or employment, can be removed. The act of 1892 limited the power of removal of salaried appointees to cause shown after a hearing had. The act of 1894 went further and limited such "cause" to incompetency and conduct inconsistent with the position held. Under the act of 1888 (Chap. 119), which was amended by the act of 1892, it was held that an ordinary employee upon daily wages was not a person holding a position by appointment receiving a salary. (*Meyers v. The Mayor*, 69 Hun, 291.) It was undoubtedly in part to cover such cases, and to extend to all veteran employees the protection there questioned, that the act of 1894 was passed. In our judgment the latter act covers the whole field of State and municipal service, guaranteeing preferential appointment and employment, together with security of tenure, during competency and good behavior. It thus supplements and completes the protection afforded by the anterior city acts, and it embraces every form of employment.

It follows that the relator's allegation of employment was sufficient; that no allegation of appointment with a salary was requisite, and that, as the relator was removed for reasons other than those authorized by the act of 1894, the removal was unlawful. The respondents could only remove him for incompetency and conduct inconsistent with the position held, and the burden of alleging and proving that incompetency and inconsistent conduct was upon them.

The judgment should, therefore, be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

HARRY H. KUTNER, Appellant, v. JAMES C. FARGO, as President of  
THE AMERICAN EXPRESS COMPANY, Respondent.

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*Malicious prosecution — the plaintiff must prove want of probable cause in addition to his innocence.*

In an action to recover damages for malicious prosecution the plaintiff must prove, in addition to his innocence, the want of probable cause on the part of the defendant, although there may be cases where, the plaintiff knowing nothing of the facts and circumstances under which the arrest was procured, the bald fact of his arrest, coupled with the circumstances attending it, may suffice, *prima facie*, to show a want of probable cause.

The facts in this case considered and held insufficient to constitute proof of want of probable cause.

APPEAL by the plaintiff, Harry H. Kutner, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 6th day of April, 1897, as resettled by an order entered in said clerk's office on the 29th day of April, 1897, setting aside a verdict in the plaintiff's favor and granting the defendant's motion for a new trial made upon the minutes.

*Leo G. Rosenblatt*, for the appellant.

*Lewis Cass Ledyard*, for the respondent.

BARRETT, J. :

This is an action for malicious prosecution. The defendant is the president of a voluntary unincorporated association organized under the statute with regard to associations consisting of seven or more persons. The plaintiff had a verdict for substantial damages which the learned trial judge set aside. The motion to set aside the verdict and for a new trial was made upon the trial judge's minutes. The plaintiff, in appealing from the order, contends that the motion for a new trial was definitely passed upon, adversely to the defendant, at the trial, and consequently that the trial judge was without jurisdiction to grant, as he did, a further hearing upon the motion after the close of the term. The defendant, upon the other hand, contends that the motion for a new trial was not finally passed upon at the trial. There seems to have been a dispute below as to what

actually transpired upon the rendition of the verdict. The plaintiff insisted that the trial judge denied the defendant's motion for a new trial, reserving leave only to move to dismiss the complaint. The defendant insisted that leave generally to renew the motion for a new trial was reserved. The dispute was solved in the defendant's favor by the learned trial judge, and the record as made up on this appeal sustains him. The record contains the following direction made at the close of the trial: "The Court: I will let the motions to set aside the verdict and for a new trial and the motion to dismiss stand undetermined and change my ruling accordingly, and when you present your case I will consider them. I think I will deny them again. I will let the motions stand as made and withhold decision in respect to the matter."

It is true that this conflicts with the affidavit of a clerk in the office of the plaintiff's attorneys, who gives an excerpt from the stenographer's minutes, in which this direction does not appear. We must, however, abide by the record, especially as the learned trial judge, from his own recollection, states that the stenographer's minutes were incomplete in the particular mentioned. The following recital in the order appealed from is also quite conclusive: "And the court having decided that it had entertained the motion to set aside the verdict and for a new trial at the trial, and had withheld its decision thereon until further argument after the minutes had been procured."

This brings us to the merits of the appeal. The defendant's motion was granted because of "substantial error at the trial." It will not be necessary to consider the particular assignments of error contained in the memorandum filed by the learned trial judge. We think the motion was properly granted for reasons of a far more radical character than those discussed in his opinion. In our judgment the complaint should have been dismissed when the plaintiff rested; and upon the close of the case a verdict for the defendant should have been directed. The burden was upon the plaintiff to prove a want of probable cause. He entirely failed to do so. He contented himself with testifying to his arrest upon the charge of stealing a package addressed to one McAllister at White Plains, and asserting his innocence in the premises. He denied having seen or handled the package in question. He

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testified, too, that prior to his arrest no one had asked him to explain anything connected with the suspected larceny; that upon the occasion when the defendant claimed that the larceny was consummated, he was permitted to leave the package room without interrogation, and that upon his arrest he declared his innocence, which thereafter he constantly asserted in the face of persistent efforts to induce him to confess guilt. The rule, however, is that the plaintiff in this class of actions must prove something more than his innocence. He is bound affirmatively to show a want of probable cause. There may doubtless be cases where the plaintiff knows nothing of the facts and circumstances upon which the arrest was procured. There may even be cases where he can ascertain nothing upon that head, and where the bald fact of his arrest, coupled with the circumstances attending it, may suffice, *prima facie*, to show a want of probable cause. But that is not this case. The facts and circumstances upon which the defendant here acted were well known and entirely accessible to the plaintiff. He was arrested upon the affidavits of an agent and clerk of the company. He was then taken before a police magistrate and committed, having waived an examination. Subsequently he was indicted, tried and acquitted. He put in evidence the indictment and accompanying papers. The latter contained the affidavits made by the defendant's agent and clerk before the police justice, also that magistrate's commitment in which he recited that it appeared to him by the depositions that the crime had been committed, and that there was sufficient cause to believe the defendant guilty. These proofs certainly showed no want of probable cause. They tended rather to show probable cause at least *prima facie*. Then, too, the plaintiff was cognizant of the evidence which was presented against him upon the trial of the indictment. It is indeed apparent that throughout he was aware of every fact and circumstance upon which the defendant had proceeded. In placing his case before the court and jury, these facts and circumstances were entirely ignored and were left to be put in by the defendant. Thus, the plaintiff sought to shift the burden which the law cast upon him. Had the defendant failed to take it up or to put in any evidence upon the subject, it would have been impossible to say whether the company had or had not probable cause for the accusation, and the jury, with light upon the subject at hand and



entirely at the plaintiff's command, would have been left wholly in the dark.

The defendant, however, upon the denial of his motion to dismiss, placed before the court and jury all the evidence upon which the company acted, and we feel bound to say that a clear case of probable cause was thereby made out. This evidence was undisputed — we mean with respect to its presentation to the defendant in good faith and without malice. The plaintiff, as we have seen, denied the handling of the package, and denied, also, the suspicious circumstances testified to by the defendant's witnesses. But the conflict at this point did not present a material question of fact for the jury. Whether the company here had probable cause or not depended upon the information which it had at the time the charge was made. (*Foshay v. Ferguson*, 2 Den. 617; *Miller v. Milligan*, 48 Barb. 30; *Delegal v. Highley*, 3 Bing. [N. C.] 950; *Seibert v. Price*, 5 Watts & Serg. 438.) There was no conflict as to the information which was actually furnished to the defendant. The informants reported to the general superintendent and manager of the company what they had observed. They were fellow-employees of the plaintiff, uninfluenced by unkind feeling, much less malice. They intended to, and, so far as they were aware, did, report what they saw accurately, and there was nothing whatever in any of their reports to suggest the slightest doubt of its truth or fairness. The higher officials of the company themselves acted upon these reports, not only in perfect good faith, but with extreme caution. The question, then, is: Were the facts thus brought to the defendant's attention — facts to which the informants were prepared to and did testify — facts of the truth of which the defendant had every reasonable assurance — sufficiently strong in themselves to warrant a cautious man in his belief that the person accused was guilty of the offense charged? (*Carl v. Ayers*, 53 N. Y. 17; *Fagnan v. Knox*, 66 id. 528; *Anderson v. How*, 116 id. 343.) The facts thus presented being undisputed, the question is one of law. These facts do not admit of two inferences. They were either sufficient to constitute probable cause, or insufficient. Without reflecting upon the plaintiff in the slightest degree, and without questioning the justice of the verdict of acquittal, we cannot doubt that the appearances were greatly against him, and that the circumstances were such as

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to furnish any discreet and prudent man with reasonable grounds for the accusation. The material facts were substantially these: The plaintiff was a way-bill clerk in the package room of the express company at Forty-eighth street in this city. He was a man of excellent reputation, and the defendant had no cause to complain of or oppress him. A number of valuable packages had disappeared in the room where he was employed, and the defendant's local agent, Mr. Sherman, determined, if possible, to find the guilty person. He accordingly instructed two trusted employees of the defendant to watch what was going on and report to him. Upon the afternoon of July 12, 1892, a clerk named Kinsley reported to Mr. Sherman that he had seen the plaintiff handling a package addressed to R. McAllister, White Plains; that the plaintiff had gone to a bin on the side of the office where only way-billed packages belonged, and had taken certain packages from the bin and thrown them into a wheel basket used for taking packages to the train for forwarding; that while doing this he retained in his hand one package which he carried to his desk; that another employee, Enright, also saw this; that after the plaintiff had gone to his desk with this package he looked up and caught Kinsley's eye; that he then turned away and brushed the package off his desk to the floor, and shortly thereafter left the room; that Enright then went to the plaintiff's desk, picked up the package, brought it over to Kinsley, made a note of the address, and then took it back and replaced it upon the floor. That evening Enright reported the sequel to Sherman. He had seen the plaintiff upon his return to the package room move the package round in front of his desk, pick it up and drop it in one of the drawers. Later Enright reported that the plaintiff in leaving the place for the day carried away a package of his own, said to be a straw hat, which he had purchased in the interim between his leaving the room and his return, inside of which Enright had observed the impression of another package corresponding in shape and size with the McAllister package. It further appeared that the McAllister package never reached its destination. There was, in fact, no record of its having been way-billed, and it has never been seen since it was dropped, according to these witnesses, into the drawer of the plaintiff's desk. There was also a later report

from another employee of the company that on the evening of the same day the plaintiff obtained from him some tissue paper, and then went to his desk and, kneeling down in front of it, wrapped something up there. There were also suspicious circumstances with regard to other packages occurring both before and after the disappearance of the McAllister package which need not be detailed. The arrest was for the larceny of the McAllister package. Before the arrest the defendant placed the whole matter in the hands of the police, and finally the facts were laid before a police justice, who advised the warrant. Upon the plaintiff's arrest, he accounted for money and property found in his possession in part by the statement that he had lately won money betting upon horse races. It is clear that the facts in their entirety as presented to the defendant were amply sufficient to justify the company's managers in acting as they did. They did not, as the plaintiff claims, so act upon mere guess or conjecture, but upon actual and substantial facts of which they were credibly informed pointing to the plaintiff's guilt. The delay which ensued between the information of these facts and circumstances and the arrest is fully accounted for. It resulted, not, as claimed, from doubt, but caution, and also from the tardiness of the police agents.

The point is made that, if the defendant knew, or ought to have known, or could with reasonable diligence and caution have ascertained, facts exculpating the plaintiff, he cannot successfully urge that there was probable cause. Assuming the correctness of this proposition precisely as put, the answer is, that there were no such facts. The plaintiff has never suggested the existence of any exculpatory fact. He has relied upon his denials. The defendant was certainly not bound to inform him of the company's suspicions and give him an opportunity to escape. Had the company done so, the plaintiff upon his own showing could simply have given its informants the lie. There were other clerks, it is true, in the package room besides those who reported upon the plaintiff's acts. But the defendant could have had no reason to believe that these other clerks had observed any of the facts in question. The persons who had observed these facts were specially assigned to the duty of observation. But for that they too would probably have remained unobservant, and the disappearances of property might have proceeded

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indefinitely. Nor was there need of special cross-examination of the reporting witnesses. Each one told the defendant's officials his story fairly and squarely, and told it without color or suspicious manner. There was no actual malice — no motive whatever for ruining the plaintiff's reputation. All parties performed a duty which they owed to the company, and the plaintiff was simply the victim of unfortunate circumstances which he has repudiated, but has never attempted to explain.

We think, therefore, that the order appealed from was right and should be affirmed, with costs.

VAN BRUNT, P. J., RUMSEY, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order affirmed, with costs.

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JAMES E. LYON, Appellant, v. MARY BROWN, Respondent.

*Trials — a jury, after sealing a verdict and separating, may be directed to reconsider its form — they need not retire while doing so — transfer by a client to her attorney — a court refusing to allow further evidence upon the question of consideration should not submit the question of consideration to the jury.*

The fact that a jury have signed and sealed their verdict and have separated before the opening of the court does not deprive the court of the right to send the jury back, when the verdict has been opened, to reconsider it; and where a verdict has been rendered for the plaintiff for a definite sum the court may direct the jury to alter it so as to be in form for the plaintiff on the first cause of action alleged in the complaint and for the defendant on the second cause of action, provided the jury finally agree to the verdict as thus altered.

It is not necessary for the jury to retire for the purpose of considering the form of the verdict.

Where, in an action growing out of a transfer by a client to her attorney, the plaintiff, who claims under the attorney, is refused permission to give all the testimony he has at hand to show what the actual consideration was, the court stating that there was then sufficient in the testimony to entitle the plaintiff to claim that his cause of action must not fail for want of a consideration, it is improper for the court to charge the jury that it was necessary for the plaintiff to establish that there was a sufficient consideration and that they must be able to discover and say what that consideration was.

APPEAL by the plaintiff, James E. Lyon, from a judgment of the Supreme Court, entered in the office of the clerk of the county of

New York on the 22d day of November, 1897, upon the verdict of a jury (except that part which adjudges that the plaintiff recover the sum of \$2,440), and especially from that portion of said judgment which makes a deduction of \$170.92, and that portion which adjudges that the defendant recover judgment against the plaintiff on the second cause of action; and also from so much of two orders entered in said clerk's office on the 27th day of October, 1897, and the 15th day of November, 1897, respectively, as denies the plaintiff's motion for a new trial made upon the minutes, with notice of an intention to bring up for review upon such appeal an order entered in said clerk's office on the 6th day of April, 1898, amending the judgment.

*A. G. N. Vermilya*, for the appellant.

*Norman J. Marsh*, for the respondent.

RUMSEY, J.:

The complaint contains two causes of action, both of which were put in issue at the trial. The plaintiff recovered a verdict upon the first cause of action and the defendant succeeded on the second. Each party entered a judgment upon that portion of the verdict which was in his favor, and the plaintiff has appealed from the judgment which was entered against him by the defendant upon the verdict in her favor on the second cause of action. The plaintiff in the first place objects to the regularity of the verdict because he says that it was not the one rendered by the jury. The facts are that while the jury were out considering their verdict the court adjourned for the day, and the jury were directed to render a sealed verdict on the next day. At the opening of the court in the morning the jury came in with a sealed verdict for the plaintiff for the sum of \$2,440. This verdict, however, was not satisfactory to the court, who directed that it should be altered so as to be in form for the plaintiff on the first cause of action, and for the defendant on the second cause of action. This seems to have been agreed to by the jury, and the verdict was thereupon entered in that way, and it appears in the record that the verdict as recorded was for the plaintiff for the sum of \$2,440 on the first cause of action, and for the defendant on the second cause of action, and judgment was entered

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in pursuance of the verdict rendered in that way. We see no objection to the proceedings which were taken on the coming in of the verdict. The fact that the jury had signed and sealed their verdict and separated before the opening of the court in the morning did not deprive the court of the right to send them back when the verdict had been opened to reconsider their verdict, if it was thought advisable or necessary for any reason to do so. (*Rogan v. Mullins*, 22 App. Div. 117, and cases cited.) It was not necessary that the jury should retire for the purpose of considering the form of their verdict. There was no reason why it should not have been put into proper form in presence of the court, as was done in this case. If the jury finally agreed to the verdict as it was rendered, and it was entered as agreed upon, there was no irregularity, and there seems to be no doubt that this was what was done.

During the trial a large number of exceptions were taken by the plaintiff, many of which we have not found necessary to consider, because, in our judgment, there must be a new trial for certain errors in the charge, which occurred in the following way :

It was alleged for a second cause of action that the defendant had been the owner of a judgment for a deficiency recovered in an action for foreclosure, in which she was plaintiff, and that she had assigned that judgment to one Peter B. Vermilya for the joint benefit of herself, Allen G. N. Vermilya and Peter B. Vermilya, and that afterwards the judgment was reassigned by Peter B. Vermilya to the defendant, upon the agreement that two-thirds of it belonged to the two Vermilyas, and the defendant should pay over to them, or to their assigns, two-thirds of all she received upon it. The complaint further alleged that the defendant received the amount of the deficiency judgment and delivered a satisfaction of it. The interest of the two Vermilyas in the judgment had been assigned to the plaintiff who sought to recover in this action the two-thirds to which he claimed they were entitled. The defense was that the judgment was assigned to Peter B. Vermilya to be used as collateral to a promissory note made by the defendant, which he was to negotiate for her benefit, and that it was taken for that purpose and for no other. Upon the trial the plaintiff sought to prove that Vermilya advanced moneys to defendant at various times and gave her notes to be discounted for her benefit shortly before the deficiency

judgment had been assigned, and in various other ways he attempted to prove the relations of the Vermilyas with the defendant concerning the deficiency judgment by way of showing that there was a sufficient consideration passing from the Vermilyas to Mrs. Brown to support the assignment of the deficiency judgment by her to them. This evidence was all excluded, the court finally saying that there was sufficient in the testimony to entitle the plaintiff to claim that his cause of action must not fail for want of a consideration; that there was no serious trouble, in his judgment, on that point. He said, further, that the only object of the inquiry was to show that there was a consideration for the agreement, and it had already been testified that there were previous agreements and that this agreement for a portion of the deficiency judgment was made by reason of the previous arrangements. For that reason the court sustained the objection to evidence as to the consideration for this judgment. It appeared in the testimony that Allen G. N. Vermilya and Peter B. Vermilya were attorneys and that Peter B. Vermilya was counsel for Mrs. Brown at the time when these transactions took place. The court was requested to charge and did charge that transactions between an attorney and a client, to the benefit of the attorney and to the disadvantage of the client, are presumably invalid, and that it was for the attorney to show that they were just and fair. He charged also that an attorney who seeks to avail himself of a contract made with his client must establish affirmatively that it was made by the client with full knowledge of all the material circumstances known to the attorney, and that such contract is in every respect free from fraud on his part or misconception on the part of the client, and that a reasonable use was made by the attorney of the confidence reposed in him. He also charged that before the plaintiff could recover upon the second cause of action the jury, even if they found that there was some understanding with reference to the deficiency judgment, must find that the same was founded upon a consideration, and that the jury themselves must be able to discover and say what such consideration was.

The plaintiff objected to the charge so far as these three propositions were concerned and took an exception separately to each one of these three propositions. It is not disputed that these propositions, abstractly, stated as propositions of law, are correct, and it may

well be that it was proper to charge each one of them in this action ; but yet, in view of the course which was taken in the admission of testimony, we are of the impression that the charge thus made operated seriously to the disadvantage of the plaintiff.

Peter B. Vermilya, through whom plaintiff derived his title, was counsel for the defendant when this transaction was had. The transaction itself consisted in the assignment by the client to her attorneys of a judgment for a large amount, and there can be no doubt that, to enable the plaintiff to recover upon that assignment, he was bound to show that the transaction was a proper one and just and fair in all its parts as between the defendant and her counsel, who were the recipients of this large judgment. In showing that, the question of consideration was exceedingly important. Unless there was a consideration, and that consideration was full and ample, the jury might well say that the plaintiff had not complied with the requirements of the law as stated in the three propositions which were charged, and, therefore, had failed to make out his cause of action. But the defendant insisted that there was no consideration for this transfer. According to her story, the judgment was transferred to Vermilya solely for the purpose of enabling him to use it as collateral security for her benefit. The plaintiff, therefore, in establishing his case was called upon to prove an actual consideration which was denied by the defendant. He was at liberty, therefore, to introduce all the testimony which he had as bearing upon that question. The case of *Crossman v. Lurman* (33 App. Div. 422) is ample authority for that proposition, if authority were needed. But this he was not permitted to do. The judge excluded testimony which he offered tending to show that there was a consideration for this judgment, for the express reason, as he stated, that sufficient evidence of the fact had been given to establish the cause of action. After that ruling had been made, the plaintiff surely had the right to believe that no question of consideration would be submitted to the jury. He was entitled to a ruling that he had shown a sufficient consideration to sustain the assignment, or he should have been allowed to give all the testimony he had upon the subject of consideration. It was clearly unjust, after his evidence of consideration had been excluded, for the jury to be told that it was necessary for the plaintiff to establish to their satisfac-



tion that the transfer was founded upon a consideration, and that they must be able to discover and say what that consideration was.

The jury were told that as the plaintiff derived his title to this judgment from the attorneys and counsel for the defendant, he was bound to show that the agreement between them which resulted in this transfer was just and fair in all its parts. That also necessarily involved the fact that there was a consideration for the transfer, but this fact was disputed. Therefore, when the court had refused to permit the plaintiff to give all the testimony he had at hand to show what the actual consideration for this transfer was, it was clearly improper for him to put upon the plaintiff the duty of establishing that there was a sufficient consideration, in the face of the contradiction of that fact by the defendant.

For these reasons the charge worked an injustice to the plaintiff, and a new trial should be granted.

It is unnecessary to consider the various other exceptions which were taken, as it is not certain that any of them will be presented upon another trial, but for the error indicated the judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event of the action.

VAN BRUNT, P. J., BARRETT, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

34 3225  
1835-661

JAMES R. O'BEIRNE, Respondent, v. CHARLES S. CARY and NICHOLAS V. V. FRANCHOT, Appellants.

*Trial*—effect of both parties moving for the direction of a verdict—undertaking on appeal given to stay proceedings on a portion only of the judgment appealed from—objection that it was ineffectual, and, therefore, without consideration, when untenable.

Where both parties move for the direction of a verdict all questions of fact are remitted to the court to determine, and the judgment rendered must stand unless there is no proof of some essential fact.

A judgment entered in an action directed the payment of the costs of the action to the plaintiff and, also, the payment of a sum of money to a trust company, a party defendant, for the equal *pro rata* benefit of the plaintiff and all other

holders of certain mortgage bonds for whom the trust company was the trustee. On appeal therefrom an undertaking was given to the plaintiff by which the sureties, in case of the affirmance of the judgment or the dismissal of the appeal, agreed to pay all costs and disbursements that might be awarded against the appellants and also the amount directed by the judgment to be paid to the plaintiff, but such undertaking contained no agreement to pay the amount of money adjudged to be paid to the trust company. In proceedings subsequently instituted by an order to show cause why the trust company should not be restrained from issuing execution under such judgment, an undertaking was given to secure the payment of such amount directed to be paid to the trust company, upon the giving of which all proceedings of the trust company in enforcement of the judgment were stayed until the hearing and determination of the appeal.

In an action upon the undertaking given to the plaintiff,

*Held*, that that undertaking operated, so far as the plaintiff was concerned, to stay proceedings upon that portion of the judgment which awarded the costs to him; that the sureties thereon could not resist the enforcement thereof upon the ground that it was not effectual to stay proceedings upon the judgment, and that there was, therefore, no consideration for it.

APPEAL by the defendants, Charles S. Cary and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 18th day of April, 1898, upon the verdict of a jury rendered by direction of the court.

*Adelbert Moot*, for the appellants.

*Frank Sullivan Smith*, for the respondent

RUMSEY, J. :

This action is brought upon an undertaking given by the defendants upon an appeal from a judgment. At the trial there was no disputed question of fact, but at the close of the evidence the court ordered a verdict for the plaintiff, to which the defendants excepted, and from the judgment entered upon that verdict this appeal is taken.

As each party moved for a verdict, and neither requested to go to the jury on a question of fact, all questions of fact were remitted to the court to determine, and its determination must stand unless, to sustain this judgment, it is necessary that some fact should exist of which there is no proof. (*Provost v. McEncroe*, 102 N. Y. 650;

*McGuire v. Hartford Fire Ins. Co.*, 7 App. Div. 575, 577.) If there is evidence to warrant the finding of all facts which are necessary to sustain the judgment, it must be assumed that such facts were found by the court.

In the year 1895 James R. O'Beirne, the plaintiff in this action, had recovered a judgment against Bullis and Barse in an action brought in behalf of himself and all other bondholders of the Allegheny and Kinzua Railroad Company. The Central Trust Company was also a defendant in the action, not for the purpose of a recovery against it, but because it was the trustee for the bondholders, and O'Beirne asked that any recovery that was had in the action be paid to that company to be distributed to the bondholders as their interests might appear. The action resulted in a judgment by which Bullis and Barse were adjudged to pay to the Central Trust Company \$341,745.65, for the equal *pro rata* benefit of the plaintiff and all other holders of the first mortgage bonds of the Allegheny and Kinzua Railroad Company. That judgment contained no further recovery against the defendants, except that by a separate clause it was adjudged that the plaintiff recover of the defendants Bullis and Barse his costs of the action, which amounted to \$3,586.40. These two provisions of the judgment requiring the payment of money by Bullis and Barse were, as will be seen, entirely independent of each other. This judgment was entered on the 29th of June, 1895. On the third day of July executions were issued to the sheriffs of several counties in the State, requiring the collection of this judgment. On the fourteenth of July the undertaking in suit was made by the defendants in this action. That undertaking recited the recovery of the judgment of the 29th of June, 1895, and that Bullis and Barse intended to appeal, and then contained an agreement on the part of Cary and Franchot that the appellants would pay all costs and disbursements that might be awarded against the appellants, if such judgment should be affirmed or the appeal be dismissed, not exceeding \$500, and also undertook that if the judgment appealed from or any part thereof was affirmed, or the appeal was dismissed, the appellants would pay the said sum of \$3,586.40, directed to be paid by the judgment, to the respondent, together with all accrued interest thereon. The undertaking contained no agreement to pay the amount of money adjudged to be

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paid to the Central Trust Company. It apparently was insisted by the appellants that that undertaking was sufficient to stay all proceedings upon the execution, but it does not seem to have been so regarded by the Central Trust Company, and the papers which were introduced in evidence by the defendant show that on the fifteenth of July an order to show cause was granted why the Central Trust Company should not be restrained from issuing or enforcing any execution whatever under the said judgment. The papers upon which that order was granted, and which are referred to in it, alleged the giving of the undertaking in suit in this action, and then stated that notwithstanding the filing of that undertaking the sheriff proposed to enforce that portion of the judgment which directs the defendants Bullis and Barse to pay to the Central Trust Company the sum of \$341,745.65. There is no charge in those papers that the plaintiff insisted, after the giving of that undertaking, upon enforcing that portion of the judgment which directed the payment of costs to him.

The order to show cause came on to be heard before a judge other than the one by whom the case was decided, and an order was made staying the proceedings of the Central Trust Company until the return of the justice before whom the original case was tried, and upon the giving by the appellants of a bond for \$100,000, which bond was given. At a later date the motion which had been postponed came on to be heard before the justice before whom the case had been tried, and an order was made by him reciting the original order to show cause why the Central Trust Company of New York should not be restrained from issuing or enforcing any executions under the judgment entered June 29, 1895, and all proceedings which had been had under that order; and then ordering that upon the giving of an undertaking by the defendants Bullis and Barse, in the sum of \$100,000, all proceedings upon the judgment or upon the executions issued should be stayed pending the appeal to the General Term. The order further directed that the former bond for \$100,000, given as a temporary stay until the hearing before this justice, should be vacated and required it to be canceled. After the giving of this undertaking, all proceedings upon the executions were stayed until the hearing and determination of the appeal, which resulted in the affirmance of all parts of the judg-

ment. Thereupon the Central Trust Company brought an action upon the undertaking for \$100,000, making the obligors in that undertaking and James R. O'Beirne defendants. O'Beirne, however, was made a defendant simply for the purpose of obtaining an adjudication that he, as plaintiff in the original action, had no interest in the money to be recovered upon the undertaking for \$100,000. Judgment was rendered in that action in accordance with the prayer of the complaint, by the terms of which the Central Trust Company recovered from the obligors in that undertaking the sum of \$100,000, with interest and costs, and that judgment contained a further provision that James R. O'Beirne had no interest in any recovery in that action except so far as he might be entitled to share *pro rata* as a bondholder of the Allegheny and Kinzua Railroad Company. After the entry of that judgment O'Beirne brought this action upon the undertaking which had been given to secure the costs of the original judgment. The defendants resist this recovery solely upon the ground that the undertaking given by them was not effectual to stay proceedings upon the judgment; that there was no consideration for it, and, therefore, that it cannot be enforced.

It cannot be denied that an undertaking upon appeal has no force at common law, and that it cannot be enforced unless it has been effectual to accomplish the purpose intended, and that is to stay the proceedings upon the judgment appealed from. (*Hemmingway v. Poucher*, 98 N. Y. 281.) But it is quite clear, we think, from the statement of facts made above, that this undertaking was effectual to accomplish the purpose for which it was intended, and that it was not superseded by the undertaking for \$100,000 in pursuance of the order. The judgment which was appealed from contained two separate recoveries, upon each one of which an execution might have been issued, and each one of which entitled the successful party mentioned in it to recover from the defendants a sum of money. These two portions of this judgment were entirely independent of one another so far as the right to enforce them was concerned. If, instead of issuing one execution directing the recovery of the whole judgment, each person who had a recovery had seen fit to issue an execution for his own part, there was no reason why he should not have done so. The fact that only one execution was

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issued is not necessarily conclusive to show that the second undertaking was alone depended upon to stay the proceedings. Indeed, the papers put in evidence by the defendants themselves show that this is not the fact. The affidavit upon which the order to show cause was granted states that the sheriff insisted, in spite of the undertaking sued upon here, in enforcing that portion of the judgment directing the payment of a large sum of money to the Central Trust Company, and there is no suggestion anywhere in the papers that the plaintiff, after the giving of that undertaking, claimed that the proceedings on the judgment were not stayed so far as his right to collect costs was concerned. The final order made upon that motion recites that the application was why the Central Trust Company should not be restrained from issuing and enforcing any execution upon the judgment, and there is no suggestion anywhere in that order that it was intended to restrain the plaintiff from collecting his costs or that an order was necessary to accomplish that result.

It appears, therefore, that this order which finally determined the amount of the security to be given, was granted for the purpose of restraining the Central Trust Company only; that it appeared by the papers upon which it was granted that a separate undertaking had been given to restrain the collection of costs, and the order requiring the giving of the undertaking for \$100,000 makes no mention of the undertaking sued upon here, but expressly vacates the first undertaking for \$100,000 which was given for a temporary purpose.

It is quite clear, as we think, from all these facts, that the learned justice upon the trial was correct in his conclusion that this undertaking was still existent, notwithstanding the giving of a subsequent one for \$100,000; that it operated, so far as the plaintiff was concerned, to stay proceedings upon that portion of the judgment which awarded the costs to him, and, therefore, that there was a sufficient consideration for it.

The judgment, therefore, should be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

34 334  
150a 230

ALFRED J. TYRRELL, Appellant, v. THE MAYOR, ALDERMEN AND  
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

*New York city — the commissioner of street cleaning may call out employees on Sunday — extra pay for work on Sundays for all such employees — punctuation in the construction of statutes.*

The words "and extra pay for work on Sundays" in section 1 of chapter 368 of the Laws of 1894, authorizing the board of estimate and apportionment of the city of New York to fix, within certain limits, the compensation of employees in the department of street cleaning in the city of New York, are not limited in their application to "hostlers" employed in that department, but authorize the board of estimate and apportionment, in its discretion, to provide for extra pay for work on Sundays for every man in the employ of the street cleaning department, including section foremen.

*Seem*, that, under the provisions of said section, that "the members of the department of street cleaning shall be employed at all such times and during such hours and upon such duties as the commissioner of street cleaning shall direct, for the purpose of an effective performance of the work devolving upon said department," the commissioner of street cleaning is authorized to call out the employees of the department for work on Sundays if, in his judgment, it is necessary.

The fact that the board of estimate and apportionment in taking action under the statute passed a resolution which provided that the salaries "shall be and are hereby fixed at the amounts stated in the statute," and that, after the presentation to the board of estimate and apportionment of statements of the necessary expense of extra pay for Sunday work, that board, by resolution, fixed the amount to be apportioned to that department at a specified sum, following it with a statement that the above appropriation included all necessary expenses for Sunday work, is conclusive as to the intention to allow compensation for such work pursuant to the provisions of the statute, and raises a fair inference that it was intended to allow it to the persons to whom it might be apportioned in the estimate of the commissioner of street cleaning.

An appropriation having been made for extra pay for Sunday work, it is not important that the amount to be paid to each person who is called upon to perform such work is not fixed, as he is entitled to recover, in an action for such Sunday work, either what his work is actually worth, or at the same rate as his daily week day pay.

The punctuation of a statute is entitled to slight weight in determining its construction, which depends upon what appears to be the intent of the language, taken as a whole, in view of the circumstances surrounding the passage of the act, and the evil which it was intended to remedy.

INGRAHAM and McLAUGHLIN, JJ., dissented.

APPEAL by the plaintiff, Alfred J. Tyrrell, from a judgment of the Supreme Court in favor of the defendant, entered in the office

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of the clerk of the county of New York on the 3d day of February, 1898, upon the decision of the court rendered after a trial at the New York Trial Term before the court without a jury.

*John W. Weed*, for the appellant.

*Theodore Connolly*, for the respondent.

RUMSEY, J. :

The plaintiff was for some years section foreman in the employ of the department of street cleaning in the city of New York. In that capacity he was called upon very frequently to work on Sunday. For that work he was not paid, and he brings this action to recover its value. After a trial before the court, without a jury, his complaint was dismissed and from the judgment entered upon the decision of the court he takes this appeal.

On the 26th of April, 1894, by chapter 368 of the laws of that year, the salaries and compensation to be paid to employees in the department of street cleaning were changed. Before that time the pay of each employee had been fixed by an act of the Legislature; but by the statute mentioned above, authority was given to the board of estimate and apportionment to fix the salaries at amounts not to exceed the amounts stated in the statute, which reads as follows: "The annual salaries and compensations of the members of the uniformed force of the department of street cleaning shall be fixed by the board of estimate and apportionment, and shall not exceed the following." Then follows the enumeration of the different officials employed in that department, commencing with the general superintendent and ending with the hostlers, having after the name of each official the maximum amount which might be allowed to him. At the end of this enumeration occurs the following, "and extra pay for work on Sundays." The plaintiff claims that these words apply to each person, the amount of whose salary is stated in the act; whereas, the defendant claims that these words apply simply to the hostlers, whose salary is the last one fixed by the words of the act. In the construction of statutes there is to be considered the condition of affairs existing at the time when the statute was passed; the evil which was sought to be remedied by the passage of it; the circumstances surrounding the subject to which



the statute is applicable, and the condition of the law previous to its passage. (1 Kent Comm. 460, 465 ; *Donaldson v. Wood*, 22 Wend. 395 ; *People ex rel. Wood v. Lacombe*, 99 N. Y. 49.) From the time of the organization of the State the policy of the law has been to forbid all unnecessary work on Sundays. This prohibition was included in one of the earliest statutes passed by the Legislature, and it was continued in the several revisions down to the time of the Penal Code. By these various revisions before the passage of this act all secular work and labor on Sunday was forbidden, except under certain circumstances, which were particularly specified in the statute, but when the Penal Code was passed, those provisions, which were originally incorporated in it, attracted the attention of that portion of the community which desired a freer Sunday, and the result was that the stringency of the former act was somewhat abated, and the Penal Code, while prohibiting all labor on Sunday, excepting works of necessity and charity, broadened the definition of work which was permitted by providing that in works of necessity and charity is included whatever is needful during the day for the good order, health or comfort of the community. (Penal Code, § 263.) Ordinarily one who is employed, whether upon a salary or upon wages, to work for another, is not expected to work on Sunday unless the nature of his employment is such as necessarily to require it. For instance, if one is hired for domestic service or for farm labor, that necessarily may include the doing of some things which have to be attended to on Sunday as well as on week days, such as ordinary domestic work, and the care of animals and things of that kind. But except where Sunday work is included in a particular employment by virtue of its very nature, the employee cannot be compelled to work on Sunday, and the refusal to work is not a sufficient ground for discharging him from his employment. (*Karner v. Smith*, 8 Conn. 14 ; *Berry v. Wallace, Wright* [Ohio], 657.) If an employed person sees fit to work on Sunday he cannot recover compensation for the services performed on that day. (*Palmer v. The Mayor, etc., of N. Y.*, 2 Sandf. 318 ; *Watts v. Van Ness*, 1 Hill, 76.) The plaintiff when he was employed took his employment subject to these rules. It may be that if he had refused to work on Sunday he would have been discharged from his employment, but although his employer had the power thus to punish his refusal to do what the law did not compel him to do,

nevertheless, the working on Sunday was not within his contract. It appears from the evidence in the case, however, that before the passage of the law of 1894, referred to, the men in the employ of the street cleaning department had been expected to work on Sunday whenever they were called upon to do so, and they did work a very considerable portion of those days during the year. The law is settled that for such work they were not entitled to additional compensation (*Palmer v. The Mayor, etc., of N. Y.*, 2 Sandf. 318), and so it appeared that these men, although they were not by statute compelled to work on Sunday, nevertheless were called upon to do so, and did do so, and were not at liberty to receive any compensation for it. This was the condition of the law at the time of the passage of the act of 1894. By that act, as has been already shown, in addition to a maximum rate of pay given to each man in the street cleaning department, the board of estimate and apportionment were at liberty to give extra pay for work on Sundays to some of the employees at least. The statute, after making that provision, continued as follows: "The members of the department of street cleaning shall be employed at all such times and during such hours and upon such duties as the commissioner of street cleaning shall direct, for the purpose of an effective performance of the work devolving upon said department." This provision of the statute clearly authorized the commissioner to call out the employees of the department for work on Sundays, if in his judgment it was necessary, as well as on any other days, which he had not by statute the authority to do before. This law, therefore, differed in two respects from the statute as it had existed before. In the first place it provided for extra pay on Sundays to somebody. In the second place it gave to the commissioner of street cleaning explicit authority to call the men out for work on that day if it was necessary to do so. The power to call out the force of the department for work applied to every man in it. Each one of them was at the disposal of the commissioner if he saw fit to require him to appear, and it necessarily follows that except for those whose duties were such that a portion of them had to be performed on Sunday, no man was compelled to come out for work unless he was called upon for that purpose. So the evidence shows. It appears from the testimony of the superintendent that

the men were called upon to work on Sunday as might be necessary, and unless they were called upon they were not expected to do so. This, however, did not apply to the stable foreman, the assistant stable foremen or the hostlers, because it appears from the testimony of the superintendent of the stables that these men were compelled to keep their horses and stock in shape, and were compelled to have the hostlers there to groom and feed and water the horses on Sunday, as might be expected. Sunday work being necessary for the hostlers by virtue of the nature of their employment, it would be fair to assume that their salaries would be fixed with reference to the fact that they were always expected to work on Sundays, and there would be no reason that they should have any extra pay for that sort of work, which they were always to do as a portion of the regular employment. And so of the assistant foremen of the stables; it was their duty to superintend the care of the horses, and it was just as important that they should be present on Sunday to see that the work was properly done, as it was that the hostlers should be present to do it, and so it might be assumed that their salary would be fixed with reference to the necessity that existed that a portion at least of their work should always have to be done on Sunday. But with reference to the other employees of the department, including the superintendent, it was entirely different. Whether they worked on Sunday or not, depended upon the order of the commissioner. If they were called out they were obliged to work, otherwise not. It was not easy, therefore, to fix their compensation in view of the work on Sunday, because they might or might not be called upon to do it, and if they were not called upon they would be overpaid, if pay for that work was allowed as part of their salaries. The only just way, therefore, was to do precisely what was done by the statute: provide that they might have extra pay if they were called upon to do work on Sundays, and this, in my judgment, is the plain meaning of that statute.

The defendant seeks to confine the words "and extra pay for work on Sundays" to the hostlers, because he says that in the nature of things the hostlers were expected to work on that day, and for that reason it was proper to give them extra pay. But it appears from the testimony of Wallace, who was superintendent of stables, that when he was a foreman at the stables he was expected to be on

duty on every Sunday, and there is no reason why the words "and extra pay for work on Sundays" should not apply to the stable foreman who was expected to do work on Sundays as well as to the hostlers. But the construction contended for by the respondent forbids such an allowance to be made, or an allowance to the stable foremen, but confines it solely to the hostlers, who were only a portion of those who were always called upon to do work on that day. This construction is sought to be defended by the punctuation. In the statute each official is mentioned, with the maximum salary to be allowed to him, and this is followed by a semi-colon, and that is the punctuation down to the words "of the assistant stable foremen, nine hundred dollars each." These words are followed by a semi-colon; then occur the words "of the hostlers, seven hundred and twenty dollars each," with a comma, and then the words "and extra pay for work on Sundays." Relying upon this punctuation, the defendant insists that the words "and extra pay for work on Sundays" can only be made to apply to the hostlers. But the punctuation of a statute is of very slight importance in its construction. This clearly appears from the well-known method of procedure while the statute is pending in the Legislature. It is introduced; ordered printed; referred to a committee; it is then printed; it is reported by the committee, with the amendments; it is then printed again and put upon its final passage, and after it has been passed it is engrossed with more or less accuracy, and the engrossed bill is the one which contains the authoritative words of the act. The duty of punctuation is not imposed upon anybody, and no satisfactory inference can be drawn as to the construction of the act from the fact that it contains this or that punctuation. The courts do not leave to punctuation much if any force, but rest the construction of a statute upon what appears to be the intent of the language taken as a whole, in view of the circumstances surrounding its passage, and the evil which it was intended to remedy. (Suth. Stat. Const. § 232; *Morrill v. The State*, 38 Wis. 428; *Hammock v. Loan & Trust Co.*, 105 U. S. 77.) Such a construction as the defendant contends for would give Sunday pay to the hostler only; and take away the power to give it to other employees who were at work in the stables. This construction should not be adopted unless it is required, and the mere fact that the law is punctuated in a

particular manner does not afford a sufficient reason for it. Upon a careful consideration of the statute there can be no question, as it seems to me, that it authorized the board of estimate and apportionment, in its discretion, to provide for extra pay for work on Sundays, for every man in the employ of the street cleaning department.

But it is said by the defendant that the board has not allowed such compensation, nor fixed the amount. This, as it seems to me, is clearly erroneous. The board took action under this statute on the 31st of July, 1894. It passed a resolution reciting the statute in *hæc verba* and then fixed the annual compensations and salaries at the amounts stated in the statute as quoted in the recital of the resolution. The effect of this depended of course upon the construction of the statute, and if, by fair construction, the statute provided that the board of estimate and apportionment might give extra pay for work on Sundays to each employee of the department, the resolution was clearly sufficient to do it. That it was done appears quite clear by the subsequent action of the board of estimate and apportionment. In 1893 the final estimate for the department of street cleaning said nothing about work on Sundays. In 1894 there was presented to the board of estimate and apportionment the statements of the necessary expenses of extra pay for Sunday work, and that, four days afterwards, was followed by a resolution of the board by which the final estimate of the amount to be apportioned to the department was fixed at \$2,396,000, and that was followed by a statement that the above appropriation includes all necessary expenses for Sunday work. In view of the fact that the estimate of the commissioner had included an amount to be apportioned for extra pay for Sunday work, the fact that this final estimate states that the necessary amount for that purpose is included in it, is conclusive that it was intended to allow it pursuant to the provisions of the statute, and it raises a fair inference that it was intended to allow it to the persons to whom it was apportioned in the estimate of the commissioner of street cleaning. If an appropriation was made for extra pay for Sunday work it is a matter of no importance that the amount to be paid to each person who was called upon was not fixed. He had the right to have either what his work was actually worth or to be paid for Sundays at the same rate of daily pay that he received for other days. It appears in this case that the daily pay

of the plaintiff was \$3.19, and there is testimony to the effect that that was a reasonable compensation for his services. In either case, therefore, he would be warranted to recover that sum if he was entitled to recover anything for the Sunday work. By fair inference from the statute he was so entitled, and, therefore, it was error to dismiss his complaint, and the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., and BARRETT, J., concurred; INGRAHAM and McLAUGHLIN, JJ., dissented.

INGRAHAM, J. (dissenting):

The plaintiff was a section foreman in the street cleaning department of the city of New York; from the 26th day of April, 1894, to the 22d day of March, 1895, he worked a portion of forty-seven Sundays, and sues to recover for the services performed on such Sundays in addition to the salary paid to him by the city. He concedes that he has been paid his salary, but alleges that by the provisions of the law under which he was appointed he is entitled to extra pay for work done on Sundays. The salaries of employees of the street cleaning department were provided for by section 1 of chapter 368 of the Laws of 1894. It is there provided that the annual salaries and compensation of the members of the uniformed force of the department of street cleaning shall be fixed by the board of estimate and apportionment and shall not "exceed the following." There then follows an enumeration of the employees of the department and a sum of money is specified following each position enumerated. After the office of general superintendent the amount specified is \$3,000, and of the assistant superintendent, \$2,500; then an enumeration of the other officers which includes that of the section foreman; the amount named after specifying this office is \$1,000. Other employees of the department are enumerated; and after specifying each officer a sum of money is named. The last employees named are the hostlers and there follows, "seven hundred and twenty dollars each, and extra pay for work on Sundays." The section then continues: "The members of the department of street cleaning shall be employed at all such times and during such hours and upon such duties as the commissioner of street cleaning shall direct for the purpose of an effective

performance of the work devolving upon said department." It will be noticed that this statute does not of itself fix the salaries and compensation of the employees of the department. It provides that such compensation shall be fixed by the board of estimate and apportionment, but shall not exceed the sums mentioned. Thus, the board of estimate and apportionment had the power to fix the salary of the officers and employees specified, at any sum not exceeding the limit fixed by the statute. Until that board acted, the compensation to be paid to these officers had not been fixed.

The plaintiff testified that he was appointed on the street cleaning force in 1889 and continued an assistant foreman until January, 1890; that at a later period he was designated a section foreman and continued as such until March 22, 1895. From 1890, when he was appointed, down to his discharge, he was paid at the rate of \$1,000 per year for his services. He testified that he was required to work on Sundays; that he protested against doing so to the general superintendent and also to the district superintendent; that the superintendent of the department responded to his protest that if he did not work he would lose his position. It seems from his testimony that all of the uniformed force was required to do more or less work on Sundays as well as on week days. It was further proved that at a meeting of the board of estimate and apportionment, on July 31, 1894, a resolution was adopted which recited what purported to be section 1 of chapter 368 of the Laws of 1894, and then resolved that the annual salaries and compensation of members of the uniformed force of the department of street cleaning "shall be and are hereby fixed at the amounts stated in the statute as quoted in the foregoing preamble, to take effect from and after January twenty-sixth, the date of the passage of chapter 368 of the Laws of 1894." By this resolution there was no special action of the board of estimate and apportionment fixing as any part of the salary of the plaintiff any sum of money for extra work on Sundays. His salary was fixed at the amount stated in the statute. Now, the amount stated in the statute, as recited in the preamble as the salary of the section foremen, was \$1,000 each; and that seems to me to be the amount which the board of estimate and apportionment fixed as the salary of such section foremen. Assuming that the board of estimate and apportionment had power to fix an amount which would

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be payable to each of these officers recited in the preamble as extra pay for work on Sundays, it seems to me that to entitle them to such extra compensation some specific sum must be fixed by the board of estimate and apportionment for Sunday work for each employee. That the board did not do. They fixed the salaries of these employees at the amount stated in the statute as quoted in the preamble. The amount stated in the statute as so quoted as the salary of the section foremen was \$1,000 per year each, and as that was the amount of salary fixed by the board of estimate and apportionment that salary was all that the plaintiff was entitled to.

But I think it also clear that it was the meaning of the statute that the salary of the section foremen should not exceed \$1,000 per year. The section in question fixed the compensation of all of the uniformed force of the department. After fixing an annual compensation for each officer there followed a semi-colon, thus separating each officer from those that preceded and those that followed; and at the end of this enumeration is the provision, "of the hostlers, seven hundred and twenty dollars each, and extra pay for work on Sundays." From this provision of the statute it would seem plain that the words "and extra pay for work on Sundays" applied only to the hostlers. The Legislature gave to the board of estimate and apportionment power to fix, in addition to the \$720 per year to be paid to the hostlers, an additional compensation for Sunday work, but made no such provision for the other officers named. An officer taking this appointment under the statute would understand that his salary was not to exceed \$1,000 per year and that it was to cover all services rendered to the city under his appointment whether on Sundays or week days. That he might be called upon to work on Sundays was apparent from the statute, and such work would not entitle him to receive any compensation in addition to that fixed by the board of estimate and apportionment. His salary for the work performed under the statute was fixed, and if he did not wish to perform the services required of him for the compensation fixed by law he was not compelled to remain in the employ of the department. Many other officers are required, by the nature of the services which they are appointed to perform, to work on Sunday, notably policemen and firemen; and it is clear that the salary paid to them includes the service that they perform on Sunday.



I think, therefore, that the salaries as contemplated by this statute were not to exceed the amount named, and that the provision that the board of estimate and apportionment could fix a sum as compensation for work on Sundays applied only to the hostlers; that the board of estimate and apportionment, in passing the resolution which they did, fixed the salary of the plaintiff at \$1,000, the amount stated in the statute, and that he was not entitled to any greater compensation for his services to the city. There is nothing to show that by subsequent action the board allowed to the plaintiff any sum for extra Sunday work. It appears that on December 27, 1894, the commissioner of street cleaning presented to the board of estimate and apportionment an estimate of the necessary expenses for Sunday work which would include a payment to each of the officers named in this section of the statute, but there is no evidence that the board took any action on this report which would entitle plaintiff to any compensation in addition to the salary allowed him by the former resolution.

I think, therefore, that the plaintiff was not entitled to recover extra pay for Sunday work, and that the judgment appealed from should be affirmed, with costs.

McLAUGHLIN, J., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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EDWARD A. CALAHAN, Respondent, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

*New York city—action for services rendered to the board of fire commissioners—failure to record a resolution of such board reciting such employment—oral evidence establishing the passage of such resolution.*

In an action for services rendered by the plaintiff as an electrical expert for the city of New York under the alleged direction of the board of fire commissioners, a defense that he was not employed by any competent authority to do the work is not established where it appears that, although, during the time that the plaintiff was at work, there was not upon the record of the board of fire commissioners any entry of a resolution pursuant to which he was employed, a resolution was subsequently passed by that board reciting the passage of a

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resolution employing the plaintiff at ten dollars a day (which resolution, on account of the absence of the secretary, was not entered upon the minutes), and amending the minutes accordingly, and where it further appears, by the testimony of the president of the board, that such resolution had been adopted. In such a case the president of the board may testify to the passage of the resolution and his testimony is not objectionable on the ground that it varies the record.

APPEAL by the defendant, The Mayor, Aldermen and Commonalty of the City of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 4th day of April, 1898, upon the verdict of a jury, and also from an order entered in said clerk's office on the 7th day of April, 1898, denying the defendant's motion for a new trial made upon the minutes.

*Theodore Connoly*, for the appellant.

*Lorenzo Semple*, for the respondent.

RUMSEY, J. :

This action was brought to recover for certain work done by the plaintiff for the defendant, as an electrical expert. There is substantially no dispute as to the facts. On the 20th of May, 1895, the board of fire commissioners passed a resolution to invite the attendance of an electrical expert at a meeting to be held on the twenty-first of the month. The plaintiff was present at that meeting. Subsequently the plaintiff worked as an electrical expert for the city under the direction of the board of fire commissioners, one hundred and twenty-six days, for thirty-seven of which he received payment at the rate of ten dollars a day. He claims that he was employed by the board of fire commissioners to do the work for that price, and he brings this action to recover his compensation for eighty-nine days, the remainder of the time during which he worked, and for which he was not paid. The defense was, substantially, that the plaintiff was not employed by any competent authority to do this work. During the time that the plaintiff was at work there was not upon the record of the board of fire commissioners any entry of the resolution pursuant to which he was employed; but on the 22d day

of July, 1896, a resolution was passed by that board reciting that on the 21st of May, 1895, Calahan had been employed as an electrical expert at ten dollars a day and that at that time, on account of the absence of the secretary, no minute of said employment was made upon the minutes of that meeting, and amending the minutes of that meeting by adding to them the statement that, by a resolution of the board, it was duly determined that E. A. Calahan be employed as an electric expert to aid the board in the investigation of the bureau of fire alarm, telegraph and fire appliances, his compensation to be at the rate of ten dollars a day. This resolution was offered in evidence upon the trial. It was objected to by the defendant, but his objection was overruled, and the resolution was received.

In addition to that, the president of the board of fire commissioners testified to the passage of the resolution for the employment of the plaintiff, substantially as it was recited in the resolution of July 22, 1896, but that it did not appear on the original minutes of the board because of the absence of the secretary. This evidence, also, was objected to upon the ground, as claimed by the defendant, that it was not competent to vary the record by parol testimony. His objection was overruled and the evidence was received under his exception, and the defendant relies upon the correctness of these two rulings to reverse the judgment. The right of the plaintiff to recover in this action depends upon the fact that he was lawfully employed at the agreed compensation and that he did the work, and not at all upon the fact that the minutes of the board of fire commissioners are properly kept, or whether they are kept at all. It was no part of his duty to keep them, nor had he any right to interfere with them, nor had he any way of ascertaining whether the resolution was entered upon the minutes. If the resolution was passed and he did the work in pursuance of it, he was entitled to recover without regard to the question whether the secretary of the board had done his duty in keeping accurate minutes. (*Bigelow v. Perth Amboy*, 25 N. J. Law, 297; *Moore v. The Mayor*, 73 N. Y. 245.) He was not precluded by the fact that nothing appeared in the minutes upon the subject. There is no statute making the record of the board of fire commissioners the only evidence of the passage of a resolution, but the plaintiff is at liberty, if it becomes necessary for him to make proof

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of that fact, to prove it just as any other fact might have been proved. It was competent, therefore, for him to establish by the testimony of the president of the board, as he did, that the resolution was passed; and that evidence was not objectionable because it varied a record. Parol evidence may always be received to show that a resolution was passed by a municipal corporation authorizing certain work to be done, if the records fail to show it. (Dillon Mun. Corp. [4th ed.] §§ 300, 301.)

There can be no doubt, either, of the power of the board to amend its minutes, if such amendment became necessary. (Dillon Mun. Corp. [4th ed.] § 297.)

The evidence objected to was, therefore, competent and properly received, and the judgment and order must be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment and order affirmed, with costs.

JENYNS C. BATTERSBY, Plaintiff, v. PETER F. COLLIER, Defendant.

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*A notice of appeal, when improper — complaint in an action for libel — criticism of a picture — a libel must relate to professional character generally, not to a particular work.*

Where exceptions are ordered to be heard at the Appellate Division in the first instance upon the dismissal of the complaint by the court at the trial, and judgment is suspended until the hearing and decision thereon, the service of a notice of appeal is both unnecessary and improper.

The complaint in an action for libel should set forth the words complained of as used by the defendant, and it is not sufficient to set out their tenor and effect with innuendoes.

In an action for libel against the plaintiff in his profession as an artist, the complaint alleged that, in the article complained of, published in the defendant's newspaper, the words occurred: "What matters it if the Colonel's ideas of color, light and shade were a trifle hazy, if his perspectives was a something extraordinary, his 'breadth' and 'treatment' and 'tone' truly marvelous? The surrender was a great, a vast picture, and it was the Colonel's life."

*Held*, that, conceding that these words applied to a picture painted by the plaintiff, the natural construction of them would not make them anything more than

a fair criticism of the particular picture — such as is always permitted in regard to any work of art to which the attention of the public has been invited — there being, in this case, no allegation in the complaint that the words were published with any malicious intent.

Nothing can be said to be libelous of a man in his profession unless it degrades or lowers him in his professional character generally, and it is not a libel of one in that regard to say that, in any particular work, he has fallen below the proper standard or has made a failure.

MOTION by the plaintiff, Jenyns C. Battersby, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

*Charles Wehle*, for the motion.

*John T. Fenlon*, opposed.

RUMSEY, J. :

Before proceeding to the discussion of this case, it is proper to call attention to the form of the order directing the exceptions to be heard in this court in the first instance. That order provides for the service of a notice of appeal, which was entirely unnecessary and improper. Where the exceptions are ordered to be heard, as was done here, and judgment is suspended until the hearing and decision, there is nothing to appeal from. The only proceedings that can be taken are, the making of a case or bill of exceptions and bringing the exceptions to be heard in this court; and no judgment can be entered until after the determination of the Appellate Division shall be had upon the motion for a new trial.

The action is for a libel of the plaintiff claimed to have been published in a periodical controlled by the defendant. It has been twice tried. Upon the first trial, the plaintiff had a verdict which, upon appeal, was reversed by this court. Upon the second trial, the complaint was dismissed before any evidence had been given, for the reason that the facts stated in it did not constitute a cause of action. The exception taken to that ruling was ordered to be heard in the first instance in this court, and the case now comes here upon a motion for a new trial made by the plaintiff upon the exception thus taken.

The plaintiff in his complaint seeks to present his case in three

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aspects, although he does not set out in form three causes of action; but he claims that the facts stated by him are sufficient to show that a libel was published of him personally by holding him up to ridicule and contempt, and that the same publication is also a libel against him in his profession as an artist by malicious criticism of a picture produced by him.

So far as the first claim is concerned, it was disposed of when this case was before the court on a former appeal. At the trial then under review, the court withdrew from the jury any question of libel so far as the painting was concerned, but left it to them to determine whether the publication held the plaintiff up to ridicule by untruthfully describing or portraying him as living in such a state of poverty, when attempting to complete a painting of no artistic merit, that he finally died of want and in misery and wretchedness. Upon the appeal it was held that the complaint did not set out facts sufficient to constitute a libel against the plaintiff personally, and for that reason that the learned court had erred in sending that question to the jury. (*Battersby v. Collier*, 24 App. Div. 89.) So far, therefore, as that supposed cause of action is concerned, the question is determined, and it must be held that there are not in this complaint any sufficient allegations to constitute a cause of action against the plaintiff personally.

The only question then left is, whether the facts set out in the complaint are sufficient to constitute a cause of action for a libel against the plaintiff in his profession as an artist. That matter was, by the former decision, left undecided. It was therein held, however, that the complaint, while it need not set forth the extraneous facts which show the application of the libelous matter to the plaintiff, must contain the alleged libelous matter itself; and that a reference to it and a statement of what the plaintiff infers from parts of it which are not set forth in the complaint, are not sufficient. In actions of this kind, the words complained of as used by the defendant must be set out in the complaint, and it is not sufficient to set out the tenor and effect of them. (*Ward v. Clark*, 2 Johns. 10; *Odgers Sland. & Lib.* 471.) This is necessary in order that the court may judge whether the words constitute a cause of action, and also because the defendant is entitled to know the precise charge against him and cannot shape his case until he knows it. It is not

sufficient to give the substance or purport of the libel with innuendoes. This being the rule, the question presented here is to be determined by a consideration of that portion of the article which is set out in the complaint; and unless that portion, interpreted in view of the surrounding facts stated in the complaint, constitutes a libel against the plaintiff in his profession as an artist, the ruling at the Trial Term was well made, and the motion for a new trial must be denied.

The complaint states, substantially, that the plaintiff is an artist, and that for six years he has been and still is engaged in painting a picture representing the meeting of Generals Grant and Robert Lee at Appomattox Court House, at which time the plaintiff was present as an officer in the United States service. It is said in the complaint that the picture was produced from sketches made by the plaintiff from personal recollection and from pictures and photographs; that the plaintiff's studio was in West Thirtieth street in the city of New York; that numerous persons who were introduced to the plaintiff by friends called at the said studio and were permitted to inspect the said picture, although the same was not completed; that in December, 1892, a writer employed by the defendant on his newspaper called at the plaintiff's studio and was introduced by a friend and inspected the picture, and that all the details thereof were explained to her. It is alleged that after the inspection by this writer, and on the 24th of December, 1892, an article appeared in the defendant's newspaper, entitled "The Colonel's Christmas," and contained certain illustrations designed to represent the colonel, both living and dead.

It is not necessary to consider the allegations with regard to these illustrations, which are relied upon simply to constitute a libel against the plaintiff personally, because it has already been decided that they are not effective for that purpose.

The complaint then contains further allegations, that, while the plaintiff is not mentioned in the article, nor any name given to the "Colonel," the references to the plaintiff, to his work and to his studio, are so full and complete that all who have heard of the plaintiff and his work in producing the painting, all his friends and acquaintances who read the article, recognize the fact that the plaintiff is meant and referred to as the "Colonel" in said article, and

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the complaint contains other details tending to show that the person referred to in the article is the plaintiff. It is also stated in the complaint that the references in the article to the studio mentioned, and the description of the person engaged in painting the picture represented in the article, the picture itself, and the place where it was painted, and the similarity of the plaintiff to the painter, are all unmistakable and describe the plaintiff and his picture and his studio. The complaint then contains an allegation that the article so published and references therein to the plaintiff under the name of the "Colonel" are libelous, and calculated to degrade and ridicule the plaintiff and to lower his character as an artist and as the painter of said historical painting; that the painting is referred to as an "awful daub," and that all references to the picture which do not describe it as a "daub," the work of an immature if not imbecile person, are sarcastic.

Thus far in the complaint no portion of the libel has been set out, and we have only the inferences which the plaintiff sees fit to draw from what he says are the contents of the article. It is said by the plaintiff that the article was written with reference to an historical picture; that the words in it are such as to point to the plaintiff as the person intended to be spoken of, and that the references are libelous and calculated to degrade and ridicule the plaintiff in his character as an artist. But all these things are stated simply as inferences which the plaintiff draws from what he says is the article published in the defendant's paper, and nothing is presented from which even the tenor and effect of the article can be inferred. The complaint then contains the following statement: "That in said article the words occur: 'What matters it if the Colonel's ideas of color, light and shade were a trifle hazy, if his perspectives\* was a something extraordinary, his 'breadth' and 'treatment' and 'tone' truly marvelous? The surrender was a great, a vast picture, and it was the Colonel's life.'" The complaint alleges that the praises were only meant sarcastically and that the opposite was meant to be expressed. The complaint then contains an allegation that in and by said article it was designed to charge and insinuate that the plaintiff is not an artist and not qualified to paint a picture, and that the picture then being painted by the plaintiff was a ridic-

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\* *Sic.*



ulous production of no artistic merit and a mere "daub." There are other allegations in the complaint which it is not necessary to consider.

It was necessary, of course, for the plaintiff to set up all such matters of inducement by way of innuendo as would enable the court in construing the article to possess itself of the circumstances surrounding the case, and to construe the pleading in view of all those circumstances; but the innuendoes in the complaint cannot be made to enlarge the natural meaning of the words, nor can they be made to introduce new matter. (Odgers Sland. & Lib. 101; Towns. Sland. & Lib. 579, 580, 582.) The only object of these allegations is to enable the court fully to understand the words set out in the complaint, and to attribute to them the natural meaning in view of the circumstances surrounding the whole transaction at the time the words were printed. So, therefore, the part of this complaint upon which the plaintiff must rely as stating a cause of action for libel is, not that portion which contains inferences drawn by himself as to the defendant's meaning in publishing the article, but only those words which are actually set out as construed in view of the other allegations of the complaint.

It is quite clear that there is nothing in the words set out from which any description of the painting itself can be ascertained. It may be said that it is fair to infer from them that there was a painting and that it was painted by the plaintiff, because the complaint alleges that the person named as the "Colonel" is the plaintiff. But in considering the words, we must dismiss all that portion of the article not set out in the pleading in which it is claimed that the references to the plaintiff are libelous, and confine ourselves to the construction of the words only that are alleged. Conceding that those words apply to a picture painted by the plaintiff, the natural construction of them cannot be said to be anything more than a fair criticism of the particular picture. Nothing whatever is said as to the general qualifications of the plaintiff as an artist; but all that is said is in reference to this particular picture; and of this picture it is said that the plaintiff's ideas of color, light and shade are a trifle hazy; that his perspectives are something extraordinary, and his breadth and tone and treatment truly marvelous, and that the picture is a vast picture, and it was the colonel's life. While it

may be said that these things were meant sarcastically, yet it cannot be fairly claimed that they refer to anything more than the particular picture; and there are no allegations in the complaint from which the jury would have a right to infer that there was any other intention in the publication of the article than a fair criticism upon the particular picture which had been exhibited by the plaintiff to numerous people. It may be that, if the whole article were taken together, it would be found that the statements in it were such as to ridicule and depreciate the plaintiff in his profession as an artist and to lower his character in that regard; but the only question is whether that meaning can be deduced from the particular words set out in the complaint. Unless it can be, then, without doubt, the complaint does not set out a libel.

Fair and legitimate criticism is always permitted upon any work of art to which the attention of the public has been invited. It appears in this case that this picture was exhibited to numerous persons, and that it was intended to be exhibited at the World's Fair in Chicago in 1893. That being so, it was clearly proper for any person to whom it was exhibited to criticise it fairly and with an honest purpose. So long as that criticism was thus made, it was legitimate and could not properly be said to be libelous. (*Odgers Sland. & Lib.* 34, 36; *Garr v. Selden*, 6 Barb. 416; *Foot v. Brown*, 8 Johns. 64.) There is no allegation in this complaint that the words were published with any malicious intent. It is quite true the complaint does allege that the illustrations and the sensational references in said article falsely and maliciously represented this plaintiff in the position of a ridiculous, half-demented dotard and beggar; but these allegations are simply the inferences the plaintiff has seen fit to draw from that portion of the article which is not set out in the complaint, and do not operate as an allegation that the criticism itself was made improperly, or dishonestly or maliciously. Careful consideration of the words which are set out in the complaint shows clearly that, taken by themselves, as they must be, in view of the surroundings stated in the complaint, they constitute no charge against the plaintiff personally, but simply amount to a criticism of the work upon which he was engaged and which had been exhibited. Thus regarded, it is quite clear that they do not constitute a libel

upon the plaintiff in his profession as an artist generally. However skillful an artist may be, it is not a libel upon him to say that any particular picture of his is not good of its kind. The same rules must be applied to persons in that profession as apply to persons in every other profession; and nothing can be said to be libelous of a man in his profession except something which degrades or lowers him in his professional character generally; and it is not a libel of one in that regard to say that, in any particular work, he has fallen below the proper standard or has made a failure.

For these reasons we think that the complaint does not state facts sufficient to constitute a cause of action for libel of the plaintiff in his capacity as an artist, and that the action of the trial judge in dismissing the complaint was proper. The exceptions should, therefore, be overruled, the motion for a new trial denied, and judgment ordered dismissing the complaint, with costs.

The appeal from the order should be dismissed.

VAN BRUNT, P. J., BARRETT, INGRAHAM and McLAUGHLIN, JJ., concurred.

Exceptions overruled, motion for new trial denied, and judgment ordered dismissing complaint, with costs. Appeal from order dismissed.

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GEORGE B. HAND, Respondent, v. GAS ENGINE AND POWER COMPANY and CHARLES L. SEABURY & Co., CONSOLIDATED, Appellant.

*Advertising — to be paid for by certain deductions from the price of articles to be purchased — such provision is not applicable where the purchase is agreed to be for cash.*

Under an agreement made by a corporation providing that, "in consideration of the insertion of an advertisement \* \* \* we promise to allow and deduct from our contract price for naphtha launches, providing said price amounts to \$5,000 or more, the sum of eleven hundred and fifty-five dollars (\$1,155) on or after publication and delivery to us of twenty-five books containing our advertisement," the party by whom such advertisement is to be inserted is not entitled to offset the sum of \$1,155 against the purchase price of two launches for which he has subsequently agreed to pay the sum of \$5,000 to a corporation which had assumed the obligations of the corporation first above mentioned, where such purchase has been made without knowledge on the part of the

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corporation of the intention of the purchaser to take advantage of the advertising contract, and with a distinct statement by the president of the corporation that the sale was to be for cash, in consideration of which the corporation agreed to fix the price at the sum of \$5,000.

MCLAUGHLIN, J., dissented.

APPEAL by the defendant, the Gas Engine and Power Company and Charles L. Seabury & Co., Consolidated, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 13th day of April, 1898, upon the verdict of a jury rendered by direction of the court.

*E. P. Johnson*, for the appellant.

*Charles De Hart Brower*, for the respondent.

PATTERSON, J. :

On the trial of this action the court directed a verdict for the plaintiff upon all the evidence introduced by both parties. The defendant had asked, on that evidence, to go to the jury, and excepted to the refusal of the court to allow him to do so. The only matter to be considered on this appeal, which is from the judgment entered upon the verdict, is as to the correctness of the disposition of the cause made by the trial judge. The action was brought by the assignee of one E. S. Hand, who, on the 31st of October, 1890, entered into a contract with the Gas Engine and Power Company to insert in a book being published by him an illustrated advertisement of the articles in which the Gas Engine and Power Company dealt. It appears that the agreed value of the advertising was \$1,155, but it was provided in the contract as follows: "In consideration of the insertion of an advertisement, \* \* \* we promise to allow and deduct from our contract price for naphtha launches, providing said price amounts to \$5,000 or more, the sum of eleven hundred and fifty-five dollars (\$1,155) on or after publication and delivery to us of twenty-five books containing our advertisement," and further: "In the event of said purchase not being made good, we are to be absolutely acquitted of any charge for the advertisement herein provided." It is alleged in the complaint that on the 6th day of December, 1897 (more than seven years after this contract was entered into), the defendant, the "Gas Engine & Power Company and Charles L. Seabury & Co., Consolidated," contracted to sell to E. S. Hand, at its contract price

of \$5,000, two naphtha launches, and the said Hand agreed to purchase the same at the price of \$5,000, and requested that the same be delivered on or about May 1, 1898. That thereupon Hand duly tendered to the defendant the advertising contract and the sum of \$3,845 in cash, in full payment of the contract price of \$5,000, and demanded that the defendant allow and deduct \$1,155 from its contract price of \$5,000 for said launches, and that the said defendant refused the tender and the demand, and has refused to deliver the naphtha launches and to deduct the sum of \$1,155 from the price of the launches, and refused to accept the advertising contract at all as part payment for the launches. Therefore, it is claimed the agreed value of the advertising is recoverable in this action. It also appears that the Gas Engine and Power Company in 1896 changed its name to that of the present defendant. All the allegations of the plaintiff's complaint are admitted by the answer, except the averment respecting the making of an agreement to sell naphtha launches and of a refusal to deliver the launches, and of the plaintiff being the assignee of E. S. Hand. Those allegations are denied. On the trial of the cause, it was virtually conceded by the president of the defendant that the obligation rested upon it to recognize and perform the contracts of the Gas Engine and Power Company, and no claim is made that the advertising was not done in the manner contemplated by the contract of 1890, referred to in the complaint.

There was, however, in contest between the parties, on the trial, an issue of fact as to any agreement having been made on the 6th day of December, 1897, the defendant contending that the minds of the parties had not really met as to the terms of payment of the price at which the launches were to be sold. The only witnesses as to what occurred in the negotiations respecting the launches were the plaintiff's assignor, who was an interested party seeking to have his advertising contract enforced, and the president of the defendant, seeking to resist that enforcement, and, according to the testimony of both, nothing whatever was said concerning the deduction from the price of the launches of the \$1,155 until the negotiations were ended, and, as E. S. Hand says, he came to make payment of the stipulated price. Then, for the first time, he produced the contract for advertising and insisted upon his right to have the amount deducted from the purchase price. He says that the president of

the defendant agreed to sell him the two launches for \$5,000, which was the amount of the purchase required in order to allow the offset of the \$1,155; that the sum of \$5,000 was agreed upon, and that he tendered payment in accordance with his advertising contract. Mr. Amory, the president of the defendant, in making his statement of what occurred between himself and E. S. Hand relative to the launches, swears that Hand came to him giving his name as Stokes, stating that he wanted to buy two launches, and that he, Amory, then stated that he was willing to sell him two launches selected by E. S. Hand and fixed the price at \$5,000 with the distinct statement that the sale was to be for cash, and that he informed Hand or Stokes that a large reduction from their catalogue price would be made upon the condition of payment being in cash. Mr. Amory also swears that nothing whatever was said with respect to Stokes being Hand, or Hand having a contract which would allow the offset of \$1,155, and if that had been mentioned he would not have agreed to sell these two launches for the sum of \$5,000. His evidence is to the effect that he was dealing with Hand upon the understanding that the whole amount of the purchase money was to be paid in cash and for that reason he fixed the price at the sum of \$5,000. The negotiators were at cross purposes, Amory not suspecting the intention of Hand to claim the benefit of the advertising contract, and the latter fully intending to do so. Hand tendered the contract of \$1,155 in part payment, but Mr. Amory at once declined to receive it, and then stated that this was a special transaction and the price reduced in order that the company might get cash, which they greatly needed, that constituting the inducement of their lowering the price.

The version given by Mr. Hand of the negotiations is at variance with the claim of Mr. Amory in this regard, but, nevertheless, there was the issue as to whether or not the minds of the parties met as to the terms of payment for these two launches; and that issue should have gone to the jury. There is no question of the plaintiff's general right under the contract of advertising; there is no question that the advertising was done, but there was a distinct contest before the jury as to the parties really having understood upon what terms the dealing then pending was made. It is not worth while discussing the effect of the suppression of facts by Hand, nor of

his resorting to a trick to realize more upon his contract for advertising than would have been allowed by the defendant had Hand's full purpose been disclosed. It is enough that there was evidence to go to the jury to show that the defendant would not have agreed to sell the launches at \$5,000, unless it was distinctly understood that they were to be paid for in money at the time of their purchase or before delivery.

It is suggested that the pleadings are not in a condition to present the precise issue which the defendant sought to get before the jury, but there is a denial in the answer, and further than that all the evidence that would give rise to that issue was in the case without objection, and we must dispose of it in view of that evidence and the state of the record as it comes to us.

The judgment must be reversed and a new trial ordered, with costs to abide the event.

VAN BRUNT, P. J., O'BRIEN and INGRAHAM, JJ., concurred; McLAUGHLIN, J., dissented.

McLAUGHLIN, J. (dissenting):

I dissent. There was no dispute of fact to submit to the jury. The only question presented was one of law, and this was correctly disposed of by the trial court. It will be observed that all the allegations of the complaint were admitted by the answer, except those relating to the contract to sell the launches, the subsequent refusal to deliver them, and the assignment to the plaintiff. These allegations were denied, but they were all established on the trial by uncontradicted evidence. Therefore, when the trial closed and the motion was made for the direction of a verdict, the question presented was simply this: Whether an offer by the plaintiff to pay a portion of the purchase price of the launches in the defendant's own obligations then due was a compliance with the condition to pay cash, and equivalent to a tender of payment in cash. The trial court held that it was, and in that I fully agree. Under the advertising contract the defendant, or the party whose obligation it had assumed, agreed to allow and deduct from the contract price of launches, provided the price amounted to \$5,000 or more, \$1,155. The plaintiff's assignor fully performed the advertising contract on his part to be performed, and the price of the launches contracted to

be purchased amounted to \$5,000. Therefore, by express provision of the advertising contract, the plaintiff became entitled to have applied on, or deducted from, the price of the launches \$1,155. The defendant was then indebted to the plaintiff in that sum, and that the sale was made for cash in no way altered the situation, because, so far as the defendant was concerned, the satisfaction or extinguishment of the claim against it for \$1,155 was equivalent to cash. The payment for the launches in cash was no more necessary than the extinguishment of the indebtedness. One must be paid and the other extinguished, if there was any validity to the advertising contract. If the plaintiff had been guilty of fraud in obtaining the quotation as to the price of the launches, or in obtaining the contract as to their sale and delivery, then another question would be presented. But there is not even a suggestion of anything of this kind in the defendant's answer, and nothing from which it can be inferred, except the bare fact that the plaintiff wanted the defendant to pay an indebtedness conceded to be due. I am of the opinion, therefore, that the plaintiff complied with the condition to pay cash, by offering to pay in the defendant's own then due obligation. (*Foley v. Mason*, 6 Md. 51.)

The judgment is right and should be affirmed, with costs.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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RIVERSIDE BANK, Respondent, v. WOODHAVEN JUNCTION LAND COMPANY, Appellant, Impleaded with HERBERT F. ANDREWS.

84 — 359  
89 Mis<sup>1575</sup>

*Banking—the title of a bank to a check deposited—it is not subject to equities between the drawer and the depositor—when a check becomes due—effect of charging a protested check back to the account of the depositor.*

Where a customer of a bank deposits in his general deposit account a check drawn to his order and indorsed by him, and immediately thereafter draws a check upon such account and withdraws therefrom the amount of such deposit, the bank becomes vested with a title to the check so deposited, which is not subject to equities existing in favor of the drawer of the check as against the customer, such, for example, as that the check was given without consideration or for a consideration which failed, namely, in exchange for another check



transferred by the customer to the drawer upon a representation made by the customer that it was good, the check being, in fact, worthless.

The check so deposited is taken by the bank before maturity, as a check is not, strictly speaking, due until payment thereof is demanded within a reasonable time.

The bank's right to recover the amount of the check from the drawer is not affected by the fact that, by a bookkeeper's entry, made subsequent to the protest of the check, the bank charged the amount of the check back to the account of the depositor.

APPEAL by the defendant, the Woodhaven Junction Land Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 17th day of February, 1898, upon the verdict of a jury rendered by direction of the court.

*Louis C. Whiton*, for the appellant.

*Lyman L. Settel*, for the respondent.

PATTERSON, J.:

This is an appeal by the defendant land company from a judgment entered upon a verdict directed by the court on the trial of this action. A single question of law is involved. The material facts established on the trial are the following: One Andrews was a depositor in the Riverside Bank. On the 25th day of May, 1897, he deposited with that bank a check for the sum of \$450, drawn by the treasurer of the Woodhaven Junction Land Company to his, Andrews', order. The check was indorsed by Andrews and deposited without any limitation; or, in other words, it became part of Andrews' general deposit account. On the day of that deposit, and before it was actually made, Andrews had a balance of \$85 standing to his credit with the plaintiff. Immediately after the \$450 check was deposited, Andrews presented his own check for \$500 drawn upon the plaintiff, and on it procured that amount to be paid to him by the paying teller of the bank. The \$450 check was drawn on the Bank of Jamaica. On the same day the plaintiff sent the check to the Queens County Bank, through which it made its Long Island collections. It was presented at the Jamaica Bank on the 26th day of May, 1897, and was returned protested, payment having been stopped. Some time subsequently, the plaintiff charged back to Andrews the amount of the dishonored check. Shortly

afterwards this action was begun against the land company and Andrews to recover its amount. The defendant land company admits the making of its check and its delivery to Andrews, but sets up that the same was given without consideration or for a consideration that failed, namely, that it was given to Andrews in exchange for a certain other check of one Walter Fox and upon a representation made by Andrews that the Fox check was good, but it avers that said check was in fact worthless. The land company, therefore, has set up as against the title of the plaintiff and its right to recover, certain equities existing between it and Andrews which would render the check unenforceable in the hands of Andrews, and the claim is made that it is also non-enforceable by the plaintiff.

It is the settled law of this State that, as to a general deposit account of a dealer with a bank, the relation existing between the depositor and the bank is simply that of creditor and debtor. (*First Natl. Bank of Lyons v. Ocean Natl. Bank*, 60 N. Y. 278; *Ætna Natl. Bank v. Fourth Natl. Bank*, 46 id. 82.) The title to money, checks or drafts deposited by a customer passes to the bank. The relation of a bank to negotiable drafts or checks under such circumstances is very plainly stated in *Cragie v. Hadley* (99 N. Y. 133), and it is that, upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or drafts or checks received or credited as money, the title to the money, drafts or checks is immediately vested in and becomes the property of the bank, and it is stated that that proposition is not open to question. As the court in that case says: "The transaction, in legal effect, is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business." The question, therefore, before the court was, whether the defendant land company could show equities to defeat the plaintiff's title. The check was a negotiable instrument; the party primarily liable upon it was the land com-

pany. The plaintiff was entitled to rely upon the presumption that it had been issued for a valuable consideration. (Laws of 1897, chap. 612, § 50.) The plaintiff was a holder for value; it had taken a negotiable check of the land company, complete and regular upon its face and in the usual course of business, and gave value for it, namely: At the time the deposit was made, it paid to Andrews his check of \$500, \$415 of which must necessarily have been paid from the credit given on the deposit of the \$450 check. It was taken before maturity, for a check is not, strictly speaking, due until payment thereof is demanded within a reasonable time. (*Cruger v. Armstrong*, 3 Johns. Cas. 9; Story Prom. Notes [7th ed.], 636.) It was taken in good faith, and it is not claimed that, at the time it was negotiated, the plaintiff had notice of any equity existing in favor of the drawer, or of any infirmity in the check, or defect of title or right in the person negotiating it.

The proof establishing all these considerations being in the case, the defendant land company was not in a position to resist the plaintiff's claim. It is entirely immaterial that, by a bookkeeping entry, the plaintiff subsequently charged the amount of the check back to Andrews. Its cause of action arising on the check was against both the drawer and the indorser, and the claim against the drawer was not surrendered, nor was it released because of the entry referred to.

The judgment appealed from should be affirmed, with costs.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. ELIZABETH ORDWAY, Appellant, v. ST. SAVIOUR'S SANITARIUM, Respondent.

*Constitutional law — an ex parte final commitment of an inebriate woman to the care of a private corporation is invalid — the commitment cannot be upheld as a temporary one — a provision for a subsequent review by habeas corpus is not due process of law — temporary summary commitments of alleged incompetent and dangerous persons are proper — effect of the voluntary surrender of the inebriate.*

A commitment, under chapter 467 of the Laws of 1892, of an inebriate female to St. Saviour's Sanitarium, a private corporation, for the term of one year from the date thereof, or for so much of said term as may be necessary, in the judgment of the trustees of said corporation, for treatment and reformation, issued in a proceeding instituted, carried on and concluded without notice to the person so committed, without a hearing and without her presence, is not due process of law — such commitment being final in its nature and not a mere temporary one intended to restrain the person committed during periods of danger.

The provision of the statute in question, declaring that nothing contained in the act shall be construed to limit the power of the courts to review by habeas corpus the detention of any person committed under the act, is not a provision for due process of law, as that term means process issued before final judgment is rendered.

Such a commitment is not valid as a temporary one, under which proceedings might be entertained to investigate the condition of the person committed, as no investigation after commitment is authorized by the statute under which it was issued.

Temporary summary commitments are, however, just as valid in the case of alleged incompetent and dangerous persons as they are in the case of alleged criminals, who are held in confinement, if not bailed, until they may be put upon trial, and the constitutional provisions, relating to due process of law, do not exclude proper and reasonable police laws and regulations relating to temporary confinement and restraint until trial, or until a hearing can be had.

The fact that the inebriate voluntarily surrendered herself, with knowledge of the commitment and of the period of time for which she was committed, and of the conditions under which the commitment was issued, does not bind her to remain in the institution for any particular period, and cannot be regarded as a waiver of her right to withdraw therefrom at any time when she pleases so to do.

APPEAL by the relator, Elizabeth Ordway, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 8th day of September, 1898, upon the decision of the court rendered after a trial

at the New York Special Term, overruling her demurrer to the return to the writ of habeas corpus issued in this proceeding, dismissing said writ of habeas corpus and remanding the relator to the custody of the defendant.

*A. H. Hummel*, for the appellant.

*John B. Pine*, for the respondent.

PATTERSON, J.:

Appeal from an order made at the Special Term dismissing a writ of habeas corpus and remanding the relator to the custody of the respondent. In her petition for the writ the relator set forth that she was unlawfully deprived of her liberty by the respondent, or its officers, and also stated jurisdictional and other facts which required that the writ be granted. The respondent duly made a return and set forth that it is a domestic corporation, incorporated and existing under and pursuant to a statute of the State of New York, and was authorized by chapter 467 of the Laws of 1892 to receive and retain in its custody inebriate females, who might voluntarily surrender themselves, or who might be committed to its custody as in said act provided. It then alleged that it had the relator in its custody at the time the writ of habeas corpus was issued, and also at the time of the return thereto, and that such custody was had by virtue and authority of a commitment under and in conformity with the statute referred to, a copy of which is annexed to the return and made a part thereof. It is further alleged in the return that the relator is and was detained for and by reason of the facts alleged and set forth in the commitment as the ground for her confinement and detention as an inebriate, and for and on account of the further fact that the relator still continued to be incapable and unfit properly to conduct herself or her own private affairs by reason of a periodical, frequent and constant habit of drunkenness, from which she had not yet so fully recovered as to be safely intrusted with her liberty, and that in the judgment of the trustees of the respondent it was necessary for the welfare and protection of the relator and for her permanent cure that she continue to remain under treatment and in restraint in the respondent's institution. The return then sets forth that the relator voluntarily applied for admission to said sani-

tarium and placed herself therein of her own free will under the commitment, after having been informed that such commitment was for the term of one year, as was shown by an affidavit annexed to the return and stated to be a part thereof. The statute referred to is entitled "An act relating to Saint Saviour's Sanitarium and for the care of inebriate women." It confers upon a private corporation certain powers as to inebriate women, and also provides for certain procedure, pursuant to which commitments of such women to its care and custody may be made. By section 1 of the statute, the existence of the respondent is recognized as a corporation, and it is "authorized and empowered to receive and retain in its custody all such females as its trustees shall deem suitable subjects for its care who may voluntarily surrender themselves, or who may be committed to its custody in the manner and for the term hereinafter provided, or for so much of such term as may be necessary in the judgment of said trustees for treatment and reformation." By the 1st section there is a delegation of power to *retain* a person in the custody of the respondent either for a fixed term (which in another part of the statute is made one year under an original commitment), or for such less period as in the discretion of the trustees of a private institution may be necessary for the treatment and reformation of a person committed. By section 2 of the statute, any judge of a court of record in the county or district where an alleged inebriate female resides, may commit her to the custody of the respondent, on the consent of the trustees, signed by their superintendent or executive officer, and upon a certificate in writing of two physicians under oath "showing that such female is over the age of eighteen years and is incapable or unfit to properly conduct herself or her own affairs, or is dangerous to herself or others by reason of habits of periodical, frequent or constant drunkenness induced either by the use of alcoholic or vinous or other liquors, or opium, morphine or other narcotic or intoxicating or stupefying substance." The section provides for certain qualifications of the physicians who may make the certificate, and then enacts that the judge or justice to whom such consent and certificates are presented may require affidavits to be submitted in support of the allegations contained in such certificate or may institute an inquiry and take proof as to such facts before making a commitment. Section 3 of the statute pro-

vides that nothing therein contained shall be construed to limit the right of the courts to review by habeas corpus the detention of any person committed under the act.

Annexed to the return to the writ of habeas corpus and forming part thereof are the affidavits of two qualified physicians. They contain statements which would bring the relator within the description of a person who may be committed under the terms of this act to the custody of the respondent. There is also attached to the return an affidavit of a brother of the relator, setting forth additional facts showing that she was an irresponsible person and alleging that her restraint was necessary for her own protection. To the return is also annexed a commitment by a justice of the Supreme Court of the State of New York in the first judicial district, which recites that it had been proven to the satisfaction of such justice by the affidavits of the two physicians and of the relator's brother that the relator "is an inebriate and is incapable and unfit to properly conduct herself or her own affairs, and is dangerous to herself and others by reason of habits of periodical, frequent drunkenness induced by the use of alcoholic stimulants within the provisions of chapter 467 of the Laws of 1892, and is a suitable subject for the care of the corporation known as St. Saviour's Sanitarium, \* \* \*" and thereupon the justice adjudged "that the said several allegations above set forth and stated to have been proven are true, and that the said female is embraced within the provisions of the statute aforesaid, and is a suitable subject for the care of said corporation." The commitment, which is directed to any of the policemen of the city of New York, then proceeds to command that the relator be arrested and delivered to the respondent "to be and remain in the custody and under the care and control of said corporation *for the term of one year from the date hereof*, or for so much of said term as may be necessary in the judgment of the trustees of said corporation, for treatment and reformation."

The relator demurred to the whole of the return on the ground that all that is contained therein was insufficient in law to justify her further detention; that the commitment annexed to the return is insufficient in law in that it fails to show that this petitioner was ever arraigned before the justice of the Supreme Court mentioned in the commitment, or that any witnesses were produced before the

justice or examined by him in the presence of the relator, or that the petitioner was a resident of the city of New York, or that she had any opportunity given her to deny the charges, or that any adjudication was made after a hearing and examination of proofs in the presence of the petitioner, or that in the affidavits of the physicians anything was shown or stated why or in what manner the petitioner was incapable or unfit properly to conduct herself or her affairs, or how she was dangerous to herself or others, or that the petitioner ever by act of commission did anything dangerous to herself or dangerous to others. In passing upon this demurrer, the justice at Special Term held that all the facts stated in the return being admitted, and it appearing that the relator after notice and knowledge of the commitment voluntarily had surrendered herself to the respondent, the writ should be dismissed, with permission to withdraw the demurrer and traverse the return.

Although the facts set forth in the return are, technically speaking, admitted by the demurrer, yet that demurrer is not addressed only to the specification of omissions in the commitment, or the failure to state in it that certain things were done, which it is claimed should have been recited to show jurisdiction. The demurrer states that the relator "hereby demurs to the said return and says that the same is insufficient in law to justify *her further detention*." That general ground of demurrer strikes at the whole foundation of the original proceeding in which the relator was committed. The respondent specifically puts its right to retain the relator in custody on the provisions of the statute which it annexes to the return and makes part thereof, on the procedure had before the justice of the Supreme Court in pursuance of the provisions of the statute, on an adjudication made by the court pursuant to the provisions of the 2d section of the statute, on a commitment following that adjudication and not otherwise issued, and on the assent of the relator thereto by a voluntary surrender under final process. By the general ground of the demurrer the relator attacks the whole proceeding, claiming that it was from beginning to end an unlawful one, which she has a right to assail, not because of an erroneous adjudication, but for the reason that the court was without authority to make any adjudication, or, to state it differently, that the whole proceeding is void, as one conducted without due process of law, and



shown in the return to have been instituted, carried on and concluded without notice to her, without a hearing and without her presence, and that it has eventuated in a judgment against her, condemning her to a year's confinement and restraint, unless it shall seem fit to certain trustees of a private corporation, in their discretion, sooner to release her from that restraint and confinement.

It is the established law of the State respecting proceedings upon habeas corpus, that where it appears that a person is committed by a magistrate (*People ex rel. Danziger v. P. E. House of Mercy*, 128 N. Y. 180), or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree, he must be remanded; but if a party is detained on process, the validity of which is brought into question on jurisdictional grounds, the right to contest that validity, whether upon a traverse to the return of a writ of habeas corpus or by a demurrer to the return, exists. In *The People ex rel. Tweed v. Liscomb* (60 N. Y. 571) it is said that "if the process is valid on its face it will be deemed *prima facie* legal, and the prisoner must assume the burthen of impeaching its validity by showing a want of jurisdiction. Error, irregularity or want of form is no objection; nor is any defect which may be amended or remedied by the court from which it issues. If there was no legal power to render the judgment or decree or issue the process, there was no competent court, and, consequently, no judgment or process. All is *coram non judice* and void." Where want of jurisdiction depends upon facts which do not appear in the return, it would be necessary to set up those facts by way of traverse, but where they appear in the return, then the question of jurisdiction may properly be raised by demurrer as presenting only an issue of law. The detained person then undertakes to show the want of jurisdiction or the invalidity of the proceeding from the record itself, upon which he was committed. In the return now before us, and the schedules annexed to it, it appears that the proceeding under which the relator was committed was had under a special act, the provisions of which authorize an *ex parte* judgment, and a commitment in pursuance thereof; that this relator was committed under the authority of that act, and by a procedure which accords with that act, and which in its very nature shows that there was an *ex parte* judgment. That

presents the question of the validity of the proceeding as being one inaugurated, conducted and concluded without due process of law, for the *commitment*, as process, is shown by the return to have been the direct sequence of a proceeding begun and carried forward through all its stages, in the manner above described.

The statute under which this relator was committed separates into two groups those female inebriates who may be brought within its operation; *first*, those who voluntarily surrender themselves, and, *second*, those who are proceeded against *in invitum*. The return of the respondent is directed to showing that this relator comes within the operation of both these phases of the statute. That she did surrender herself, and that she did so with knowledge of the commitment and of the period of time for which she was committed and the conditions under which that commitment was issued, must be assumed. But by that surrender of her person to the custody of the respondent she did not bind herself to remain for any particular period. There is nothing in the nature of an enforceable contract by which she consented to deprive herself of her liberty for any fixed time. The statute in effect authorizes the respondent to receive voluntary patients for treatment. In considering this subject, Mr. Tiedeman, in his work on Limitations of Police Power (p. 115), says, "voluntary patients can, of course, be received and be retained as long as they consent to remain. But they cannot be compelled to remain any longer than they desire, even though they have upon entering the asylum signed an agreement to remain for a specified time, and the time has not expired." That remark of the writer mentioned occurs in connection with the subject of the establishment in the State of New York of inebriate asylums, and was founded upon a decision made at a Special Term of the Supreme Court in 1865, by Mr. Justice BALCOM. (*Matter of Baker*, 29 How. Pr. 485.) We have nothing to add to the reasoning (the soundness of which has never been impugned) of the learned justice in that case.

The surrender of the relator was a voluntary act; it was with knowledge of certain facts, but they cannot be regarded as a waiver of her right to withdraw when she pleased, nor estop her from reclaiming her liberty if she so desired, for her acquiescence in an unauthorized judgment (assuming for the moment that it was unau-

thorized) would have no more binding effect upon her than if she had signed a consent to remain in the institution for a fixed period.

Concerning those provisions of the statute under consideration which relate to the commitment, by adversary proceedings, of an inebriate female, it is to be remarked that only those women may be committed who are over eighteen years of age, who are incapable and unfit to conduct themselves or their own affairs properly, or who are dangerous to themselves or others by reason of habits of drunkenness. It is very clear that the object and purpose of this act are not penal but protective, but in its effect the same result is produced as if it were penal, namely, the deprivation of liberty of the person proceeded against.

No matter what may be the ostensible or real purpose in restraining a person of his liberty, whether it is to punish for an offense against the law or to protect the person from himself or the community from apprehended acts, such restraint cannot be made permanent or of long continuance unless by due process of law. Neither the Constitution of the United States, in the 14th amendment, which operates upon the States, nor the Constitution of the State of New York, has undertaken to define what due process of law is, and no definition by courts or writers has ever been so comprehensive as to indicate process fitted to every case that may arise; and in the nature of things such a definition cannot be formulated. We refer to that process by or under which a person is detained for a definite period of time, as in this case of one year, and not to that summary process which issues to take into custody a supposed or alleged dangerous or incompetent person, and under which he may be detained until an investigation in the ordinary course of law may be had. It is not open to contest that such temporary commitments of a summary character may be made *ex parte* and in the exercise of the general police power of the State to arrest and temporarily confine dangerous persons. They are due process of law, but where a person is confined by what is *upon its face* final process, and by which he is consigned to incarceration or restraint of his person by adjudication for a long period, that is to say, by a *judgment* claimed to be binding upon him, there is not due process of law unless he has had notice and a hearing, or at least such a hearing as implies

notice. The observations of Judge EARL in the case of *Stuart v. Palmer* (74 N. Y. 191) are as apt as anything that can be said upon this subject. "It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice MILLER of the United States Supreme Court, to leave the meaning to be evolved 'by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' (*Davidson v. Board of Administrators of New Orleans*, 17 Albany Law Journal, 223.) It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. *We cannot conceive of due process of law without this.*" In *Bertholf v. O'Reilly* (74 N. Y. 519) Judge ANDREWS, in speaking for the court, says: "We need not enter into any elaborate discussion of the meaning of the words 'due process of law.' This has been done in numerous judicial decisions. They are held, under the liberal interpretation given to them, to protect the life, liberty and property of the citizens against acts of mere arbitrary persons, in any department of the government. (DENIO, J., in *Westervelt v. Gregg*, 12 N. Y. 212.) These are the fundamental civil rights for the security of which society is organized, and all acts of legislation which contravene them are within the prohibition of the constitutional guaranty. In judicial proceedings due process of law requires notice, hearing and judgment; in legislative proceedings conformity to the settled maxims of free governments, observance of constitutional restraints and requirements, and an omission to exercise powers appertaining to the judicial or executive departments. It is as difficult as it would be unwise to attempt an exact definition of their scope." While it is thus incontestible that as a general rule there cannot be due process of law without notice, hearing and judgment, the point is made that with respect to incompetent or helpless persons the State is possessed of power as *parens patriæ*, and with regard to dangerous persons it also has authority to take them into its custody and care,

for their own protection or the safety of society. Neither the 14th amendment of the Constitution of the United States, nor section 6 of article 1 of the Constitution of the State of New York was designed to interfere with the legitimate exercise of that function of State government which for want of a better name is called the police power. (*Barbier v. Connolly*, 113 U. S. 27; *Mugler v. Kansas*, 123 id. 623; *People v. Ewer*, 141 N. Y. 129.) That power may be exerted for the protection of the public health, morals or safety, and the Legislature may pass laws to attain these objects even if sometimes they involve temporary restraint of the person without notice or hearing as in the case suggested (*Matter of Doyle*, 16 R. I. 539) of lunatics "who are dangerous to themselves or others \* \* \* in the dangerous periods of their lunacy," or the destruction of property without notice or hearing as in the suppression of a nuisance, as was held in *People ex rel. Copcutt v. Board of Health* (140 N. Y. 1). In either case summary and *ex parte* action is necessary for the public safety. But the statute now under consideration goes far beyond the condition of danger. It subjects the person to restraint, not during periods of danger, but for a year if a judge so orders, and for "treatment and reformation." As to harmless lunatics, idiots and habitual drunkards generally the laws of this State provide adequately for notice and hearing before there can be restraint of their persons or sequestration of their property. What reason exists why a person alleged to be incompetent or dangerous should not have an opportunity, before *judgment* finally passes against him confining him for a long period which he cannot shorten, to contest the charge, as much as a person accused of crime? The rights of one are as sacred and inviolable as of the other. Some proof of a *prima facie* case must be made before an arrest is authorized. An alleged criminal is hedged about with safeguards and protections. Why should not an alleged incompetent or dangerous person receive the same protection? Shall *ex parte* proof that would only avail to hold an alleged criminal for trial be regarded as conclusive proof against a supposed unfortunate? Constitutional immunities are precisely the same as to each. Again, we wish to be understood as speaking only of process issued on final adjudication, and repeat that temporary summary commitments are just as valid in the case of alleged incompetents

and dangerous persons as they are in the case of alleged criminals who are held in confinement if not bailed, until they may be put upon trial. The constitutional provisions do not exclude proper and reasonable police laws and regulations, but acts of the Legislature which go beyond the allowance of *temporary* confinement and restraint until trial or hearing may be had, and the accused person have his day in court in some way customary or adequate to enable him to present his case, are invalid exercises of legislative power.

The main question presented by this appeal was substantially before the Supreme Court at Special Term in the *Matter of Janes* (30 How. Pr. 446), a case which is cited as authority by almost every writer who treats of the subject and by courts of high authority in other jurisdictions. Mr. Tiedeman, in his work above referred to (p. 116), has based upon it the statement that in all "cases of forcible restraint of inebriates the restraint is unlawful except temporarily to avert a threatening injury to others, unless it rests upon the judgment of a court rendered after a full hearing of the cause. The commitment on *ex parte* affidavits would be in violation of the general constitutional provision that no man can be deprived of his liberty except by due process of law." In *Evans v. Johnson* (23 L. R. A. 737), in the West Virginia Court of Appeals, the *Janes* case is cited by the court. It came up on a writ of habeas corpus, and it appeared that the relator was committed to the New York State Inebriate Asylum upon an *ex parte* proceeding quite similar to that in the present case; that is to say, there was neither notice nor hearing. He was committed as one "lost to self control" and "dangerous to remain at large," as was recited in the commitment. The Supreme Court held that such commitment was not due process of law and violated the constitutional provision securing personal liberty. We are not called upon to approve everything that was said in the opinion of the learned justice who decided the *Janes* case, but his general reasoning is convincing, if indeed it requires any argument to show that a person deprived of his liberty by judgment of a court for a year, or what may be a lesser period according to the caprice of other private individuals, without a hearing, is not confined by due process of law. It surely cannot be said that the procedure authorized by the act under which this relator was committed and which created the wrong is

due process of law, because the Legislature chose to authorize that procedure. (*Taylor v. Porter*, 4 Hill, 140.)

We are of opinion that the commitment under which this relator is held is not due process of law, and that proceedings under the act, so far as they result in restraint for a year or a less period, depending upon discretion of those who detain the relator, are invalid, for the reason that no notice was given by which she might in the proceeding itself, by immediate intervention or subsequent opportunity to intervene, be heard in resistance of the accusation made against her. Had there been a hearing or notice the question would not arise. The situation is not saved by that section of the statute which declares that nothing contained in the act shall be construed to limit the power of the courts on habeas corpus; that is a remedy which the relator would have in any event. The statute gave her in that regard no right she did not possess in common with every other person within the boundaries of the State of New York. Due process of law means process in the proceeding in which judgment is rendered against a person. It is in that proceeding at some stage before final judgment that she must have notice or, at all events, a hearing before she is condemned to long imprisonment or restraint. The writ of habeas corpus is not a writ of error (*People v. Cassels*, 5 Hill, 164), and section 3 of the act under consideration does not enlarge the scope or office of that writ.

It might be sufficient for the disposition of this particular case that the discussion should end here, but the learned counsel for the respondent, who has treated it very fairly and without any effort to evade the exact and important point in controversy, has suggested that the commitment is valid as a temporary one and that proceedings may be entertained to investigate the condition of the relator; but such procedure is not admissible in this case. There is no authority on this record to hold this relator except under the provisions of chapter 467 of the Laws of 1892. No investigation after commitment is authorized by that statute. The action of the court was only based upon the provisions of that law. The question is not presented of an excessive exercise of lawfully conferred or acquired jurisdiction, nor can authority to commit be drawn into the case from provisions of other statutes which relate to alleged incompetent or dangerous persons.

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Upon a full consideration of the whole case, we think the order appealed from dismissing the writ was erroneously made and that the relator was entitled to a discharge.

The order must be reversed, with ten dollars costs and disbursements, the demurrer to the return sustained and the relator discharged from the custody of the respondent.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, the demurrer sustained and the relator discharged from the custody of respondent.

JENNIE MARGARET MONTGOMERY, an Infant, by KATIE EGAN, her Guardian ad Litem, Respondent, v. LYMAN G. BLOOMINGDALE and JOSEPH B. BLOOMINGDALE, Individually and as Composing the Firm of BLOOMINGDALE BROTHERS, Appellants.

84	375
82	415
82	418
82	618
84	375
78	*205

*Negligence — injury caused by the jolting of an elevator — when no neglect is shown on the part of the persons maintaining the elevator.*

In an action brought by an employee to recover damages for injuries sustained while riding in an elevator maintained by her employers, the plaintiff's theory was that a jolt or "wobbling" of the elevator, which was one of the concurring causes of the accident, resulted from the fact that the space between the shoes of the elevator car and the guides in the elevator shaft was too great, and that it was negligent and careless to use the elevator in that condition.

It appeared that four months before the accident new shoes and new guideways had been put in and lined up, the space between them not being more than was necessary to give it play; that in the ordinary course of the use of the elevator it would take two years for any considerable shrinkage to occur; that the elevator was inspected two months before the accident, and was then found to be safe for use, and there was nothing to show that from the time of such inspection down to the time of the accident anything happened to the elevator which would attract the attention of the defendants or their servants to any change in the condition of the elevator that would render it unsafe in any particular. *Held*, that the proof did not establish any remissness or neglect upon the part of the defendants in the maintenance of the elevator, and that a verdict in favor of the plaintiff could not be sustained.

APPEAL by the defendants, Lyman G. Bloomingdale and Joseph B. Bloomingdale, individually and as composing the firm of Bloom-



ingdale Brothers, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of January, 1898, upon the verdict of a jury for \$3,500, and also from an order entered in said clerk's office on the 20th day of January, 1898, denying the defendants' motion for a new trial made upon the minutes.

*Robert Thorne*, for the appellants.

*John J. O'Connell*, for the respondent.

PATTERSON, J. :

This is an appeal from a judgment entered upon the verdict of a jury in favor of the plaintiff in an accident case.

The plaintiff, at the time of the occurrence, was between thirteen and fourteen years old, and was employed as a cash girl by the defendants, who carried on business in a large retail store in the city of New York. In the premises in which their business was conducted was an elevator used by employees, and which, according to the testimony of one of the witnesses for the defendant, was commonly called the employees' elevator. That elevator was also used at certain fixed hours of the day as a lift for ashes. In its original design it was a freight elevator. At about ten o'clock on the night of the 5th of October, 1885, the plaintiff was sent on an errand, which required her to go from the basement to the fourth floor of the defendant's store. She took the elevator, the car of which was so constructed that on three sides of it were iron lattice gates, commonly called folding gates. When the elevator was in motion these gates were closed, and, when closed, there was a gap between the floor of the car and the lower points of the lattice work. The car ran upon perpendicular guides at the sides of the well, and the bearing of the car upon these guides was by appliances called shoes. The plaintiff, on the occasion in question, entered the car, there being other girls with her. When the car had reached, in its ascent, some point between the third and fourth floors, the plaintiff's right foot was thrust through the opening at the bottom of one of the folding gates and came in contact with the casing or wall of the well or some projection, and she sustained injuries in consequence.

There is some evidence to show that the flooring of the car had

been worn by the friction of ash cans upon it, so that there was a slight incline from the middle towards the outer edge of the flooring, but not to any considerable extent. The claim of the plaintiff was that the car, at the time she was thrown, suddenly vibrated or shook as by a jerk, or, as some of the witnesses say, "wobbled," and that the jerk was so violent that her foot was thrown out under one of the gates as above described. This result was attributed to the negligence of the defendants in maintaining and operating and allowing to be used by employees an unsafe or insecure appliance. The specification of negligence contained in the complaint is, that the defendants negligently, carelessly and wrongfully maintained and operated an elevator and its appurtenances, including the shaft in which the elevator was operated and the parts and appliances therewith connected, and that they were grossly negligent and careless in operating the elevator through the means of incompetent and unskillful employees, and in maintaining and operating the elevator and its appliances in an unsafe and dangerous condition. These allegations were denied by the defendant.

On the trial of the cause no evidence was offered as to the incompetency of the servant operating the elevator, and certain matters of fact in certain aspects were taken away from the jury by instructions given at the request of the defendant. The court charged that defects in the gates had nothing to do with the case as they were not shown to have contributed in any degree to the accident. The court also charged that the alleged defects in the floor were not shown to have been the proximate cause of the accident. Those two considerations were thus eliminated from the case as independent causes of the accident. Whether that was properly done we need not now inquire, but we have examined the record to ascertain if there is in the evidence sufficient to support a finding of negligence in the maintenance or operation and allowance of the use of an unsafe elevator, for that is the real issue. The duty incumbent upon the defendants was to provide a safe elevator for the use of their employees. It is entirely immaterial whether this apparatus was properly called a freight or a passenger elevator. The defendants could use any elevator or operating machinery they desired, provided reasonable care and prudence were employed in having it

safe and suitable. They were not bound to use the most approved machinery or appliances. In *Stringham v. Hilton* (111 N. Y. 195) it is said a master is not bound to furnish the best of known or conceived appliances. "He is required to furnish such as are reasonably safe (*Burke v. Witherbee*, 98 N. Y. 562; *Probst v. Delamater*, 100 id. 266) and to see that there is no defect in those which his employees must use. (*Gottlieb v. Railroad Co.*, 100 N. Y. 462.) The test is not whether the master omitted to do something he could have done, but whether in selecting tools and machinery for their use he was reasonably prudent and careful; not whether better machinery might not have been obtained, but whether that provided was in fact adequate and proper for the use to which it was to be applied. These rules are not violated when such machinery becomes unsafe, only when negligently or carelessly used. (*King v. R. R. Co.*, 66 N. Y. 181; *S. C.*, 72 id. 607.)"

The foregoing quotation indicates the rule applicable in this case with the qualification that if the machinery was negligently or carelessly used in an unsafe condition to the knowledge of the defendants, actual or imputable, the master's duty would not be fulfilled. So far as the construction of the elevator in question is concerned and its use, the evidence is convincing that it was not in and of itself unsafe. It had been in use for some years; it had been originally built for a freight elevator, but it had been used by the employees for a long time. It was not obviously dangerous. There is no evidence that any one was ever injured in or about the apparatus. It was under the observation of responsible servants of the defendants, who from time to time had made reports of its being out of repair in certain particulars, and repairs were always made. It is true that one of the defendants' expert witnesses on cross-examination is made to say that he did not regard it a safe elevator for passengers, but that was because he did not regard it as a passenger elevator at all. He subsequently withdrew that statement and distinctly testified that he did not mean to say that it was an unsafe elevator to carry passengers, but that what he meant was that it was not a passenger elevator at all, and that persons could ride in perfect safety upon it. The effect of all the testimony upon the subject of the apparatus, in and of itself being sufficient and safe, abundantly establishes that there was nothing in its construction which made it unsafe.

The attributed negligence, therefore, must relate altogether to the condition of the apparatus at the time of the accident; whether it was in such a defective condition as to render it unsafe. There was no evidence to show that the accident was due to the condition of the gates, nor to the condition of the floor, as independent causes, but it was shown by the testimony of two witnesses, the plaintiff and another child, that there was an oscillation of the car caused by the jerk which has been referred to. Putting the case as strongly for the plaintiff as may be, the accident resulted from the concurring conditions of the eccentric motion caused by the jerk, the incline of the floor which caused the plaintiff's foot to slip, and the opening under the gate which allowed her foot to pass under that gate and come in contact with the wall or casing of the elevator shaft. Are the defendants responsible for those conditions? Were they negligent in allowing the elevator to be used by the employees under such conditions?

It is shown that this elevator was periodically inspected. It also appears that it had been repaired recently. The last inspection was made in the month of August preceding the accident. The elevator was then found to be in good condition. The initial circumstance inducing the accident must have been, on the plaintiff's theory, the jolt or jerk which caused the eccentric vibration, and it is sought to account for that upon the claim that the interval or space between the guides and the shoes of the car was so great as to permit of this jolting or jerking, and that it was negligent and careless to use the elevator in that condition. These shoes were comparatively new; they were put on the ninth of June, prior to the accident, by the witness Potts, who put in new shoes, new guideways, and lined them up, and he swears that after those shoes were put on the lateral motion possible was a quarter of an inch; that it was a trifling motion and that the shoes were so adjusted or could be so adjusted that they could be tightened by an adjustable nut to take up lost motion from wear and shrinkage. These shoes were two at the top of the car and two underneath at the bottom. In the ordinary course of the use of such an elevator, it would take two years for any considerable shrinkage to occur. The space between the guides and the shoes, when the car was in motion, was not more than necessary to give it play. These shoes were put on and

adjusted some four months before the accident, and the whole testimony is to the effect that the elevator was then perfectly safe for use. The elevator was inspected in August, two months before the accident, and was then safe for use. There is nothing in the whole testimony to show that after August anything happened to that elevator or car which would attract the attention of the defendants or of the defendants' servants to any change in the condition of the elevator that would render it unsafe in any particular.

The plaintiff's case failed in that the proof did not establish that there was any remissness or neglect on the part of the defendants in maintaining and keeping in safe condition this apparatus for the use of their employees. On the point of defects in construction, or the use of machinery unsafe in and of itself, the evidence was not in such condition as to authorize a finding adverse to the defendants.

On all the testimony, we think the verdict cannot be sustained and that a new trial must be ordered, with costs to appellant to abide the event.

VAN BRUNT, P. J., O'BRIEN and INGRAHAM, JJ., concurred; McLAUGHLIN, J., concurred in result.

Judgment and order reversed, new trial ordered, costs to appellant to abide event.

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JOHN KOHLMANN and WILLIAM SPREEN, Appellants, v. WALTER SELVAGE, as General Manager and Attorney of C. A. BAKER, and Others, Underwriters, Respondent.

*Fire insurance — provision that gasoline shall not be used on the premises — responsibility of the insured for a gasoline lamp attached to the exterior wall of the building by a tenant of the stoop thereof.*

Certain articles in a building were covered by a policy of fire insurance which conferred the privilege "to use electric lights in the above-mentioned premises," and provided that "if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above-described premises" gasoline, the policy should be void. The insured property was destroyed by a fire caused by the explosion of a gasoline lamp which a man, to whom the insured had rented a platform or stoop in the

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rear of the building, had attached to the outside wall of the building and had used for some time prior to the fire.

In an action brought to recover upon the policy it was,

*Held*, that the insured could not recover;

That the use of the word "premises" in the privilege clause of the policy was equivalent to the word "building" in the prohibitory clause, and that the insured, having control of the premises, which included the building, were under the obligation of seeing that no gasoline was used in the lamp upon the exterior wall of the building within which the insured property was contained; That ignorance on the part of the insured of the use of the lamp by their tenant was no excuse for their failure to perform this obligation.

APPEAL by the plaintiffs, John Kohlmann and another, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 21st day of January, 1898, upon the dismissal of the complaint by direction of the court after a trial at the New York Trial Term.

The action is to recover upon a policy of fire insurance issued to the plaintiffs upon property placed in Wallabout Market, Brooklyn, in a two-story building facing on two streets. The plaintiffs used the greater part of the inside of the building for their business as dealers in wood and willow ware. At the rear of the building on one street was a platform or stoop, even with the ground floor, part of which was rented by the plaintiff to one Schomaker, a dealer in garden truck, for the purpose of displaying and selling his goods. He occupied the platform from two o'clock in the morning until about ten o'clock in the forenoon, and, at the earlier hour, it being necessary to have a light, for some days prior to the fire, he had used a gasoline lamp for that purpose, the lamp being placed upon a nail driven into the outside wall of the building. By the terms of the policy the company insured the plaintiffs on their "stock of wood and willow ware \* \* \* contained in the brick building," and the policy contained a privilege and a prohibition as follows: "Privileged to use electric lights in the above-mentioned premises," and a prohibition that there should not "be kept, used, or allowed on the above-described premises," among other things, "gasoline." The fire having occurred, this action was brought to recover the amount of the loss, and the defense was that the policy became void because the plaintiffs had allowed gasoline to be used for lighting purposes, the explosion of which had caused the fire and loss. Upon

the close of the evidence a motion was made to dismiss the complaint, which was granted, and an exception taken thereto, and from the judgment thereafter entered this appeal is taken.

*Henry Thompson*, for the appellants.

*George H. Pettit*, for the respondent.

O'BRIEN, J.:

There is no serious dispute of fact, it being admitted that the fire was caused by the explosion of a gasoline lamp which was being used by Schomaker, the dealer in garden truck, who rented from the plaintiffs the platform in the rear of the building. The serious question arises as to the construction of the terms of the policy, the plaintiffs contending that the sole subject of the insurance was the "stock of wood and willow ware," etc., which was within the building and not the building itself; and that the placing of a gasoline lamp upon the exterior wall of the building within which the stock was contained was not within the prohibitory clause of the policy, while the respondent is equally strenuous in claiming that the use of a gasoline lamp in the manner described, causing the fire as it subsequently did, was prohibited by the policy. It will, therefore, be seen that the question presented as to the true construction of the terms of the policy is narrowed down to a determination of what was meant by the statement that the insurance covered "the stock of wood and willow ware," etc., "contained in the brick building." If this was the only one of the terms of the policy to be construed, there would be force in the contention that, as the premises were not insured by the defendant, but only the goods within the building, the purpose of the policy was merely to cover and deal with the stock within the building. The force, however, of this construction is destroyed when we consider the two clauses of the policy already quoted in reference to lighting, the first granting a privilege of using electric lights and the other forbidding gasoline for lighting purposes. There is no doubt that in both these clauses reference is made not only to the interior but to the entire building so far as used and controlled by the plaintiffs; and it is apparent that the use of the word "premises" in the privilege clause is equivalent to the word "building" in the prohibitory

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clause. In the latter clause the policy provides, "if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above-described premises," among others enumerated, "gasoline," the policy shall be void. The plaintiffs, thus having control of the premises, which included the building, were placed under the obligation of seeing that no gasoline was used in violation of the terms of the policy. Yet they leased the platform at the rear of the building to a man who, for some time prior to the fire, used a gasoline lamp, resulting in the very consequence which the underwriter had stipulated against. The fact that the plaintiffs claim not to have known that the gasoline lamp was used is no defense, their ignorance being no excuse for failing to perform the obligation they assumed of seeing to it that no gasoline was used on the premises.

We think that the disposition made by the trial judge was right, and the judgment appealed from should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

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SIMON BLAUT, Respondent, v. MARGARET L. FLETCHER, Appellant,  
Impleaded with ROBERT FLETCHER.

*Debtor and creditor — the fact that a wife assists her husband in his business and speaks of the business as their business, etc., does not make her liable for goods sold for use in the business.*

The fact that a wife, residing with her husband, assists him in his business, makes payment on account of his indebtedness and speaks of the business to those persons dealing with him as their business, or speaks of herself as interested in it, is not, of itself, sufficient to show that goods sold for use in the business were sold to the husband and wife jointly, where no part of the goods were delivered specifically to the wife or used by her and she made no promise to pay for them, and it does not appear that any orders were specifically given by her, or that she intended, in any way, to make herself responsible for them, especially where it appears that the bills for the goods sold were rendered by the vendor to the husband separately, tending to show that he did not give credit to the wife.



APPEAL by the defendant, Margaret L. Fletcher, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 23d day of March, 1898, upon the report of a referee.

*Henry M. Dater*, for the appellant.

*Jacob Fromme*, for the respondent.

INGRAHAM, J. :

The action was brought to recover for goods sold and delivered to the defendants jointly. The complaint alleges that the plaintiff sold and delivered to the defendants above named, at their special instance and request, goods, wares and merchandise "at prices then and there agreed upon." There being no proof that the defendants were copartners, to sustain this action against the appellant Margaret L. Fletcher the plaintiff must prove a sale to her and an independent promise by her to pay. The appellant, in answering the complaint, denies that she ever separately, for herself or jointly with any person or persons, purchased goods, wares and merchandise from the plaintiff. The defendants were husband and wife, the business was conducted, apparently, in the name of the husband, and the action was brought to recover for goods sold and delivered for the conduct of this business. A salesman or agent for the plaintiff who made the sales testified that he called at this place of business and that he saw the husband and wife together; that the first order was given by Mr. Fletcher (the husband); that the witness asked him who owned the business, and Mr. Fletcher told him that "we started business together; he referred to, he meant him and his wife. He did not give me her name. \* \* \* Mrs. Fletcher gave me her name." The witness testified that these two names were in the plaintiff's ledger. The witness was asked to give the whole conversation at this interview, and in answer said: "When I came to the store, and I presented a card from Mr. Blaut, I said, 'My name is Krause; I heard from Mr. Joe Sparks that you are going to start a business.'" The witness testified that he spoke to Mr. and Mrs. Fletcher; that they were both in the store; that he asked them if he could sell them any goods; that he remembered Mr. Fletcher said: "If you sell your goods right and treat

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me right we will deal with you." The witness further testified that statements were made and sent to the defendants, and that Robert and Margaret Fletcher's names were on one statement that he saw; that he subsequently received a payment when that statement was in the possession of one of the defendants, and that he credited the amount of the payment upon that statement. There was further evidence by the plaintiff that at one time he saw the defendant Margaret Fletcher at her store and asked her if either of the proprietors was there, when she said: "Why, I am one of them." On behalf of the defendants it appeared that the defendant Robert Fletcher established the business; that his wife had no interest in it, except that she had loaned him some money to start the business. They both strenuously denied that any statement had been made that the defendant Margaret Fletcher was in any way interested in the business, or that either of them had ever made any statement to that effect; and it appeared that many bills had been sent to the defendant Robert Fletcher, made out to him, for the goods purchased from the plaintiff; that one bill made out to Robert and Margaret Fletcher had been sent by the plaintiff, and that that bill was promptly returned, on the ground that it was improperly made out to include Margaret Fletcher as one of the persons with whom the dealings had been had. The parties were husband and wife, living together, and while it would appear that the wife attended the store for her husband and assisted him in the transaction of the business, there was positively no evidence that she had the slightest interest in the business, except that she had loaned money to her husband. Nor is there the slightest evidence that the business was ever carried on in her name. The defendants offered to prove that no part of the profits had been paid to the wife, which was objected to by the plaintiff and excluded by the referee.

We do not think the evidence sustained the finding of the referee that these goods were sold to the husband and wife jointly. The fact that a woman resides with her husband who is conducting a business, assists him in his business, makes payment on account of his indebtedness and speaks of the business to those people dealing with him as their business, or speaks of herself as interested in it, is not of itself sufficient to show that property sold for use in the business is sold to

the husband and wife jointly. The relations that exist between the parties are such that acts or declarations of this kind do not show that the wife is a partner or interested in the business. These goods were all sold to be used in this business. No part of them was delivered specifically to the wife or used by her, nor did she make any promise to pay for them. Nor does it appear that any orders were specifically given by her, or that she intended in any way to make herself responsible for them. The fact that bills were rendered by the plaintiff to the husband separately for goods sold to him — a fact which does not seem to be disputed by any competent evidence — would tend strongly to show that the plaintiff did not give credit to the wife; and the mere fact that the wife gave her name to the plaintiff's salesman, or spoke of herself as a proprietor after the goods were sold, would not tend to show that she was a joint purchaser of the goods with her husband. No express promise was made that the wife would be responsible for these goods sold, or that she would bind her separate estate for the indebtedness incurred by her husband. Nothing was said that was inconsistent with the fact that the business belonged to, and was managed by, her husband, nor did she do anything more than assist him as his wife in the conduct and management of his business. We think upon the whole evidence it is clear that the goods were purchased by the husband for use in the business conducted by him, and that, as no partnership was either alleged or proved, this appellant was not liable. For that reason the judgment should be reversed and a new trial ordered before another referee, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered before another referee, with costs to appellant to abide event.

In the Matter of the Application of THE CONGREGATIONAL UNITARIAN SOCIETY of Bernardston, Respondent, for an Order that Execution Issue upon the Judgment Obtained by it against LUCY ANN HALE and GEORGE W. DEBEVOISE, as Executrix and Executor Respectively, under the Last Will and Testament of JOSEPH P. HALE, Deceased, Appellants.

*Application for leave to issue an execution against executors — the surrogate may require an intermediate accounting by the executors — Statute of Limitations*

On an application by a legatee to the surrogate for leave to issue execution under the provisions of sections 1825 and 1826 of the Code of Civil Procedure, on a judgment obtained against the executors of an estate, the surrogate has the power to require an intermediate accounting to determine the question as to the amount of assets in the hands of the executors where the executors allege that an accounting out of court has been had between them and the parties entitled to the estate, and that the estate has been duly distributed among the parties entitled thereto, and that at no time since the commencement of the action referred to in the petition have they been in possession of any assets of the estate.

The fact that the Statute of Limitations has run against any application for an accounting for the purpose of compelling in that proceeding the executors to pay a legacy is not a bar to a proceeding for leave to issue execution on a judgment against the executors.

APPEAL by Lucy Ann Hale, as executrix, and George W. Debevoise, as executor, under the last will and testament of Joseph P. Hale, deceased, from an order of the Surrogate's Court of the county of New York, entered in said Surrogate's Court on the 9th day of June, 1898, directing the appellants to render and file an intermediate account of their proceedings as such executrix and executor respectively, in order to ascertain the condition of the estate.

*Hugh Porter*, for the appellants.

*Frank G. Wild*, for the respondent.

INGRAHAM, J. :

The petitioner, having obtained a judgment against the executors for a legacy left to it under the last will and testament of the testator, applied to the surrogate for authority to issue an execution under the provisions of sections 1825 and 1826 of the Code of Civil Procedure. The testator died in the city of New York in the year

1883, and his last will and testament was admitted to probate on or about October 19, 1883. Letters testamentary were issued to the appellants as executors named in the will. Subsequently the petitioner commenced an action against the executors to recover the amount of a legacy, and on October 13, 1897, judgment was duly entered in favor of the petitioner against the executors for the amount of such legacy, with interest, which judgment was affirmed on appeal to this court. That judgment not having been paid, the petitioner applied to the surrogate for leave to issue an execution. In answer to that petition the executors, among other things, alleged that an accounting had been had between the executors and the parties entitled to the estate of the deceased out of court and that the said estate had been duly distributed among the persons entitled thereto, and that at no time since the action referred to in said petition, to wit, the 14th day of April, 1897, have the said executrix and executor, or either of them, either jointly or severally, been in possession of any assets of the estate of the deceased.

By section 1826 of the Code it is provided that where upon an application for leave to issue an execution it appears that the assets in the hands of the executors, after payment of all sums chargeable against them for expenses, and for claims entitled to priority as against the plaintiff, are not, or will not be sufficient to pay all the debts, legacies or other claims of the class to which the plaintiff's claim belongs, the sum directed to be collected by the execution shall not exceed the plaintiff's just proportion of the assets. By this answer of the executors a question was presented to be determined by the surrogate as to the amount of the assets of the estate in the hands of the executors. And by section 2725 of the Code, subdivision 1, it is provided that the surrogate may, in his discretion, make an order requiring an executor or administrator to render an intermediate account "where an application for an order, permitting an execution to issue on a judgment against the executor or administrator, has been made by the judgment creditor, as prescribed in section 1826 of this act." Thus, by the express provisions of the Code the surrogate, in his discretion, had the power to require an intermediate accounting upon such an application to determine the question of the amount of assets in the hands of the executors. The defense of the Statute of Limitations interposed by the executors is

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no bar to this application. The right of the judgment creditor to commence a proceeding for leave to issue execution upon this judgment did not accrue until after the entry of the judgment, and that judgment was not entered until after October 13, 1897. The inquiry upon this application relates to the assets of the estate in the hands of the executors at the time the application was made, and under the provisions of the Code before cited the surrogate had to determine what, if any, assets were in the hands of the executors at that time, and to determine that question he was authorized to order an intermediate accounting. The fact that the Statute of Limitations has run against any application for an accounting for the purpose of compelling the executors to pay a legacy is not a bar to this proceeding, which is simply for leave to issue execution on a judgment against the judgment debtors. Whether plaintiff can collect anything on that execution cannot be determined in this appeal.

The order appealed from is right and is affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Order affirmed, with costs.

In the Matter of the Petition of HENRY H. LYMAN for an Order Revoking and Canceling Liquor Tax Certificate No. 2,524, Issued to JOHN FUHRMANN, at No. 223 East Twenty-second Street, New York.

JOHN FUHRMANN, Appellant; HENRY H. LYMAN, Respondent.

*Liquor tax—the exemption in favor of premises, within 200 feet of a schoolhouse, in which liquor was sold on March 23, 1896—it is waived where the traffic was thereafter suspended for eighteen months—what is not a continuance of the business.*

The privilege conferred by subdivision 2 of section 24 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 312), permitting the traffic in liquor on premises within 200 feet of a building used exclusively as a schoolhouse, provided such traffic was actually and lawfully carried on in such premises on March 23, 1896, is forfeited, where it appears that, although such traffic was lawfully carried on in such premises on March 23, 1896, the license expired by operation of law June 30, 1896, and that no liquor tax cer-

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tificate was granted for the traffic in liquors upon the said premises until December, 1897, the actual traffic in liquors upon the said premises being suspended between June 30, 1896, and January 1, 1898.

The mere fact that the fixtures used in the conduct of the business in this place were not removed, and that the person who had owned a chattel mortgage on such fixtures had foreclosed the mortgage and had been in possession of the premises during the period when no business was carried on, does not constitute a continuance of the business such as would prevent the surrender of the privilege to conduct the liquor business upon such premises; nor does the intention of the parties who held the lease, as to the future use of the premises, constitute a continuance of the business.

APPEAL by John Fuhrmann from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of August, 1898, canceling the liquor tax certificate issued to the said John Fuhrmann.

*Moses Weinman*, for the appellant.

*Alfred R. Page*, for the respondent.

INGRAHAM, J. :

The only question involved upon this appeal is whether the premises upon which this defendant proposed to carry on the liquor business was within the provision contained in subdivision 2 of section 24 of the Liquor Tax Law (Chap. 112, Laws of 1896 as amended by chap. 312 of the Laws of 1897). The appellant applied for a liquor tax certificate, stating in his application that traffic in liquors was actually carried on in the premises named on March 23, 1896, and that said premises had been occupied continuously for such traffic since 1888. It appeared that in 1896 George Hahn received a license to traffic in liquors upon said premises, which license expired by operation of law June 30, 1896; that no liquor tax certificate was granted for the traffic in liquors upon the said premises until December, 1897, and that the actual traffic in liquors was suspended upon the said premises between the 30th of June, 1896, and January 1, 1898. No liquor tax certificate having been issued for the conduct of the liquor business upon such premises during that period, the traffic in liquors thereupon was illegal. The premises in question were within 200 feet of a building used exclusively as a schoolhouse; and under section 24 of the

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Liquor Tax Law the traffic in liquors cannot be permitted in said premises unless such traffic was actually and lawfully carried on in said premises on the 23d of March, 1896. If on the 23d day of March, 1896, this place was lawfully occupied for such business, the appellant was entitled to a liquor tax certificate, unless such traffic in liquor were subsequently abandoned. Then such abandonment worked a forfeiture of the privilege conferred by the statute. That question was presented to this court in the fourth department in *People ex rel. Bagley v. Hamilton* (25 App. Div. 428). It was there held that where "the business of one proprietor is closed up and no resumption thereof attempted by his successor for sixty days, we think that, within the spirit of the law, the privilege which it grants must be regarded as surrendered." We think that case presents the correct construction of the act and that it is authority for the determination arrived at by the court below. The mere fact that the fixtures used in the conduct of the business of this place were not removed, and that the person who had owned a chattel mortgage on such fixtures had foreclosed the mortgage and had been in possession of the premises during the period when no business was carried on, was not a continuance of the business which would prevent the surrender of the privilege to conduct the liquor business upon such premises. The business thus was actually suspended for a period exceeding eighteen months. During that time no traffic of liquor could lawfully be carried on in those premises as no liquor tax had been paid under which such business could have been conducted. There was no claim that liquor was actually sold, or that any business was actually conducted on the premises during this period. The intention of the parties who held the lease as to the future use of the premises did not constitute a continuance of the business.

We think, therefore, that the order appealed from was right and should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, J.J., concurred.

Order affirmed, with costs.



JACOB SCHATTMAN and Others, Appellants, v. THE AMERICAN CREDIT  
INDEMNITY COMPANY, Respondent.

*Evidence — examination of witnesses in relation to newspaper articles — privilege of an attorney.*

It is not proper for counsel to read to a witness on cross-examination an article printed in a newspaper and ask him, "Is that statement substantially a correct statement of the fact?" when it is apparent that most of the facts stated in the article were not within the knowledge of the witness and could not, therefore, be either denied or admitted, especially where the direct examination of the witness had not been directed to any of the facts contained in this newspaper article.

On the direct examination of a witness it is improper to produce a newspaper article and ask him (reading from the article), "Do you remember seeing that in the public print on July 25, 1898?" and whether he had had interviews with various reporters and had made statements to them in connection with the case. So far as an attorney is called upon simply to prove the execution and delivery of an instrument by his client or the contents of that instrument, knowledge of which he had procured by reading it, and not through any communication from his client to him, his testimony does not come within the privilege conferred by section 835 of the Code of Civil Procedure. Neither the fact of the existence of such instrument, nor its delivery by the client, are communications made by the latter to the attorney.

APPEAL by the plaintiffs, Jacob Schattman and others, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 22d day of December, 1897, upon the verdict of a jury, and also from an order entered in said clerk's office on the 21st day of December, 1897, denying the plaintiffs' motion for a new trial made upon the minutes.

*Franklin Pierce*, for the appellants.

*Otto Horwitz*, for the respondent.

INGRAHAM, J. :

The action is brought to recover upon what is called a bond of indemnity issued by the defendant, whereby the defendant agrees to indemnify the plaintiffs against "loss to the extent of and not exceeding ten thousand dollars, resulting from insolvency of debtors over and above an annual net loss of \$3,000, three

thousand dollars." The particular loss for which the plaintiffs claim indemnity was caused by the insolvency of one Bach, by which it is claimed that the plaintiffs sustained a loss of upwards of \$15,000. The defense was that the plaintiffs had received from said Bach a large sum of money or other property in full settlement or on account of such indebtedness, and had executed and delivered to said Bach a general release from all liability to the plaintiffs on account thereof. On cross-examination of one of the plaintiffs, counsel for the defendant asked the following question: "Let me read you an article that was published in the *New York Times* of July 25th, and ask you if it is a correct statement of the failure of Mr. Bach." This was objected to by counsel for the plaintiffs as "hearsay, immaterial and incompetent." In answer to that objection the court said: "He can testify whether it is a correct statement of the failure." Counsel for the plaintiff stated: "I think reading the *New York papers* is not. He may let him read it;" to which the court replied: "The paper is not offered in evidence; I will receive it;" to which counsel for the plaintiffs excepted. Counsel for the defendant then read to the witness a statement from a daily newspaper of the date of July 25, 1893, which contained a statement of Bach's financial embarrassment, the obtaining of a judgment against him, a report of the amount of his liabilities, among which were mentioned the plaintiffs' claims, with a statement of a person who was acting as an attorney for the plaintiffs, that a large part of the plaintiffs' claim was secured by an assignment of outstanding accounts, "and for the balance they took a bill of sale on merchandise in the store, giving Mr. Bach \$2,000 and a release of their claim," with a further statement as to the financial condition of Bach, and his method of conducting his business. The witness was then asked: "Is that statement substantially a correct statement of the fact?" That was objected to by counsel for the plaintiffs as calling for the conclusion of the witness, as an attempt to introduce a newspaper in evidence, and as too indefinite and general, and being generally incompetent and immaterial. To that the court replied: "I will receive it," and counsel for the plaintiffs excepted. Several other questions were asked concerning this statement to which counsel for the plaintiffs objected,

and upon the objections being overruled, excepted. The witness, in reply to these questions, while stating that he was unable to say whether it was correct, said that he could not point out any part of it that was incorrect; that he did not know anything about Bach's inside business. Subsequently Herman Joseph, an attorney who had acted for the plaintiffs in relation to their settlement with Bach, was called as a witness by the defendant. The defendant again produced this article from the newspaper and asked the following question: "In the course of the article you are quoted as follows (repeating a part of the article which purported to be a statement by said Joseph to a newspaper reporter): Do you remember seeing that in the public print on July 25, 1893?" That was objected to by plaintiffs' counsel as "immaterial and incompetent, and what appears in a newspaper has no bearing, and hearsay and declarations made by the witness at that time are immaterial and incompetent." That objection was overruled and the plaintiffs excepted and the witness answered, "I believe I did." The witness was then asked if he had interviews with various reporters or if he had received calls from various reporters on July twenty-fourth. This was also objected to as "immaterial and incompetent, and the contents of what he said to reporters is hearsay." This objection was also overruled, to which counsel for the plaintiffs excepted, and the witness answered, "My best impression is that they did." He was then asked if he had made to these various reporters some statements in connection with the Bach case, to which the same objection was taken, followed by the same ruling and an exception. The witness answered that he had had such interviews. Counsel for the plaintiffs then moved that the question which counsel had read to the witness and the answer be stricken out. This motion was denied, to which plaintiffs' counsel excepted.

We think that this method of examining a witness was entirely improper. The effect was to get before the jury the contents of a newspaper article, and, under the guise of a cross-examination, to obtain from a witness a statement of his inability to deny the truth of that article when it was apparent that most of the facts stated in the article were not within the knowledge of the witness and could not, therefore, be either denied or admitted. Counsel, on cross-examination, could have asked the witness whether certain facts

were or were not true, but it was entirely irregular and improper to read what purported to be a newspaper article and which did not in fact purport to be a declaration of the witness and ask him whether that article was true. The direct examination of the witness had not been directed to any of the facts contained in this newspaper article. He had not testified on his direct examination as to this settlement with his debtor or as to the facts commented upon in this newspaper article. The question that was involved in reading this statement in the newspaper was not strictly a cross-examination as to any evidence given by the witness upon his direct examination, and such a method of getting a newspaper article before the jury is entirely irregular and not to be encouraged. While we recognize that the extent and method of cross-examination is largely discretionary with the trial court, and an appellate court is not justified in interfering except where there is a plain abuse of such discretion, we think that it is entirely improper to allow, upon cross-examination, reading to a witness in the presence of the jury a newspaper article which does not purport to be a statement of the witness, which does not directly relate to any testimony given by the witness upon direct examination, and which is largely made up of facts which are not within the knowledge of the witness and which relate to the acts and declarations of others.

But, whatever may be said of the correctness of such cross-examination, the repetition of this method in conducting the direct examination of the witness Joseph, who was called by the defendant, was clearly incompetent and improper. Joseph was called as a witness to prove the execution and delivery of a general release from the plaintiffs to Bach. He testified that he had prepared the release as attorney for the plaintiffs, was present at the time of its execution and witnessed its delivery to Bach. He does not appear to have been an adverse witness, his only objection to answering appearing to have been a proper care on his part to avoid making any disclosure of any confidential relation between himself and his client, with a desire to obtain a direction from the court as to his duty in answering the questions asked him. On his direct examination he had testified that the plaintiffs had delivered to Bach a general release at the time of the transfer by Bach to the plaintiffs of certain property, and after cross-examination, during which the state-

ment of the witness that a release had been delivered was not questioned, counsel for the defendant again read to the witness from the article in the newspaper and asked him whether he remembered seeing that in the public print on July twenty-fifth. Then followed questions as to whether the witness had interviews with the reporters on July twenty-fourth, and whether he made statements to these reporters in regard to this case. These questions were entirely immaterial and incompetent. The witness was called by the defendant. It was entirely immaterial upon any question presented in the case as to whether or not the witness had made statements to others which corroborated his statement under oath in court, and it was entirely immaterial whether he had talked to reporters upon the subject. The result of such a course of examination was to get before the jury the fact that the defendant's own witness had made a statement prior to the trial which corroborated his statement upon the stand, and when he was acting under a professional retainer from the plaintiffs. It gave to the newspaper article a certain credit in the eyes of the jury, which would be likely to affect their verdict, and which was incompetent. The effect of this was emphasized by the action of the court upon the requests of counsel for the plaintiffs to charge in regard to this newspaper article. After the charge, counsel for the plaintiffs asked the court to instruct the jury that they should disregard entirely the article read from the newspapers of July 25, 1893, by the defendant's counsel, and especially that they should disregard any statement made as to the statements made by Herman Joseph, the witness called by the defendant. To that the court replied: "Do you mean any statement made by him while on the stand as a witness?" to which counsel for the plaintiffs replied: "No; any statements made in the article." To that the court replied: "I decline to strike out the question." Counsel for the plaintiffs then stated: "Your honor refuses to instruct the jury to disregard the portion of it that was read to them in the question by counsel?" to which the court replied: "Any part of it that was not embodied in the questions put to the witness the jury must disregard, but what was read in the form of questions to the witness—that the jury need not disregard." Counsel for the plaintiffs then said: "I ask your honor to state to the jury that there is no evidence before the jury that any statement contained in the

article to them read by the counsel in the form of a question is true." To that the court replied: "That I decline to do. The jury must determine that question from the testimony of Mr. Joseph, and you have heard what he said in reference to the release. You may also take that into consideration with the other evidence in the case and determine whether it is true or not. It is for you to say." To that counsel excepted, and the court then stated to the jury: "I have already said that the article is not to be taken into consideration; only that part of it which was read by way of putting the questions to the witness. That is all that need be taken into consideration." To that, counsel for the plaintiffs excepted. Here was an intimation to the jury that they could consider the article in the newspaper that was included in the question read to the witness and a refusal to instruct the jury that the newspaper article in itself was no evidence of the facts stated in it. For this error we are constrained to order a new trial.

There are several other questions which it is not necessary for us to determine upon this appeal as they may not be presented upon a new trial. The principal one was the competency of the testimony of Joseph as to the delivery of this general release, the objection to such testimony being that it involved the disclosure of a confidential communication between a client and his attorney. It is well for us to state, however, that so far as the attorney was called upon simply to prove the execution and delivery of an instrument by the plaintiffs, or the contents of that instrument, knowledge of which he had procured by reading it, and which was not acquired by any communication from the client to the attorney, he was not within the privilege provided for by section 835 of the Code. By that section it is provided that "an attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment." This privilege would clearly prevent the attorney from disclosing any communication received by him from his client, or any knowledge that he acquired from his client while the relation between them continued. The fact, however, of the existence of an instrument in writing executed by the client, and the fact that such an instrument was actually delivered by the client to a third party, is not a communication made by the client to the attorney. It is an inde-

pendent fact witnessed by the attorney, and to which the attorney can testify without disclosing any communication made by the client to the attorney. The same may be said as to the proof of the contents of an instrument executed by the client and delivered to a third party. The transaction is completed by the execution and delivery of the instrument. It then becomes the agreement between the parties, and the knowledge that an attorney has of that instrument is not a fact communicated to him by his client, but arises from his independent knowledge of the instrument acquired by the use of his own senses. Assuming that this release when executed and delivered had remained in the possession of the attorney, acting for both parties, it cannot be doubted but that the court would require an attorney to produce such an instrument which had been executed and delivered in any litigation in which that instrument became material. The production of such an instrument would not violate this privilege as the instrument would speak for itself, and the production of the paper would prove the agreement between the parties. The mere production of the agreement would not require the attorney to disclose any communication made to him by his client, and so, when the instrument is lost, or its production cannot be compelled so that secondary evidence of its contents is admissible, the knowledge that an attorney has as to the contents of such an instrument, acquired by the examination of the instrument, would not be knowledge acquired by a communication from the client to the attorney, any more than the production of the instrument itself would be the result of such a communication. Any statement or communication by the client to the attorney, or any advice given by the attorney as to the construction, meaning or effect of the instrument, would be incompetent; but a mere statement of the fact that a paper writing was executed and delivered in the presence of the attorney, and the statement of the contents of that instrument which was acquired by the attorney by reading, would not involve a communication from the client to his attorney. Thus, the independent fact of the execution of the written instrument, its delivery by one party to the other, or the contents of the instrument, where the knowledge of the contents had been acquired by the attorney in some other way than through a communication from his client, would not be within the prohibition of the statute.

There is another question presented, and that is whether a suf-

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ficient foundation had been laid for the introduction of secondary evidence of the contents of that instrument. It is not necessary to determine that question, as any defect in the proof as to the inability to obtain possession of that instrument may be obviated upon another trial. But for the error before pointed out in relation to the use of this newspaper article upon the trial a new trial must be ordered.

The judgment is reversed, a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

CAROLINE B. VAN BOKKELEN, Plaintiff, v. THE TRAVELERS' INSURANCE COMPANY of Hartford, Connecticut, Defendant.

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*Accident policy — injuries sustained in falling from a car platform are not sustained while riding as a passenger in any passenger conveyance.*

Under an accident insurance policy providing that if death results from injuries "sustained while riding as a passenger in any passenger conveyance using steam, cable or electricity as a motive power, the amount to be paid shall be double the sum specified in the clause under which claim is made," a beneficiary is not entitled to recover "double the sum specified," where the insured, while riding as a passenger upon a railroad train, went out from one of the cars upon the open platform at the forward end thereof, from which he fell or was thrown down, and while clinging to the handrail or step of the platform was dragged for some distance by the train, until he finally lost his hold and fell from the car upon a bridge which the train was then crossing, and thence to the ground below, where he was found dead, it not appearing by what means or from what cause the deceased fell or was thrown from the platform.

SUBMISSION of a controversy upon an agreed statement of facts pursuant to section 1279 of the Code of Civil Procedure.

*George Edwin Joseph*, for the plaintiff.

*W. P. Prentice*, for the defendant.

INGRAHAM, J. :

This is a submission of a controversy on an agreed statement of facts, and the question presented is as to the liability of the defend-



ant under a policy of insurance by which the defendant agreed to insure one Spencer D. C. Van Bokkelen against injuries resulting "through external, violent, and accidental means," and which provided that if "death results from such injuries alone, within ninety days will pay ten thousand dollars to Caroline B. Van Bokkelen, his daughter," with the further provision that "if such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable or electricity as a motive power, the amount to be paid shall be double the sum specified in the clause under which claim is made."

It is stated in the agreed statement of facts that "on or about the 31st day of July, 1897, and while said policy was in force, the said Spencer D. C. Van Bokkelen was a passenger upon a railway train upon the Morris & Essex Division of the Delaware, Lackawanna & Western Railroad, running from Jersey City to Newark, New Jersey, the platform upon the cars of which train were open platforms, not enclosed by vestibules or doors, equipped with steps for the purpose of reaching said car platform from station platforms, and equipped with iron rods or handrails upon both sides of said steps;" that "while said Van Bokkelen was riding as a passenger upon said train as aforesaid he went out from one of said cars upon the open platform, at the forward end thereof, and while upon said platform he fell or was thrown down and was dragged for some distance while the train was in motion at a speed of from eight to ten miles an hour, holding while so dragged to the handrail or step of the platform. He finally lost his hold and fell from the car upon a bridge which the train was then crossing, and from the bridge upon the ground below, and was dead when reached;" that "it does not appear and is not known by what means or from what cause deceased fell or was thrown from said platform steps." The defendant paid to the plaintiff the sum of \$10,000 provided for in clause "e" of the policy, and the question presented was whether, under clause "f" of the policy, the defendant was bound to pay to the plaintiff double the sum mentioned in clause "e," viz., an additional sum of \$10,000.

It does not appear from this statement that the insured was injured while upon the car, or that an accident to the train, or to the insured while on the train, caused or contributed to the injury. It

would seem the injuries resulting in his death were sustained by his falling from the car to the bridge, or from the bridge to the ground, or being dragged after falling from the car. The reason for his going upon the platform while the train was in motion is not stated, nor does it appear what caused the deceased to fall or be thrown from the platform or steps of the car. The fact upon which the plaintiff predicates the defendant's liability is that the deceased, being a passenger upon a railroad train and going out upon the car platform, either fell or was thrown from the platform, and was discovered upon the ground dead.

We have here a contract which clearly and without ambiguity expresses the obligation assumed by the defendant. It is that the defendant, "if death results from such injuries (bodily injuries sustained during the term of this insurance, through external, violent and accidental means) \* \* \* will pay ten thousand dollars to Caroline B. Van Bokkelen," and "if such injuries are sustained while riding as a passenger in any passenger conveyance, \* \* \* the amount to be paid shall be double the sum specified." Giving to the latter clause the meaning conveyed by the language used, it would limit the double liability to a case where the passenger sustained the injuries while riding in a passenger conveyance. A conveyance is defined to be "that by which anything is conveyed or transported, or which serves as means or way of carriage, as any vehicle." To entitle the plaintiff to the additional \$10,000, it must appear that the injuries were sustained while riding as a passenger in a conveyance used for the transportation of passengers. The clause, therefore, would not be operative where the insured was injured while riding outside or upon such vehicle. A different meaning might be given to the clause if it provided that the passenger must be in a train. But where the liability is confined to a case where the passenger was injured when "in any passenger conveyance," it would seem to exclude an injury received by a person when riding otherwise than inside of a passenger conveyance. Thus it would seem that this clause would not apply if the insured was riding in a baggage car or express car attached to a passenger train, for he would not then be in a passenger conveyance. And so the clause would not apply where the insured was riding on top of a passenger car;

and it would seem to exclude a person riding on the platform of a passenger car, when such platform was not a part of the car reserved for the use of passengers while being transported. "In the construction of contracts, \* \* \* the intention of the parties \* \* \* is to be sought in the words and language employed, and if the words are free from ambiguity, and express plainly the purpose of the instrument, there is no occasion for interpretation. Contracts or statutes are to be read and understood according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. \* \* \* If the words employed convey a definite meaning, and there is no contradiction or ambiguity in the different parts of the same instrument, then the apparent meaning of the instrument must be regarded as the one intended." (*Schoonmaker v. Hoyt*, 148 N. Y. 431.)

We have seen that the meaning of this clause is quite clear and free from ambiguity. Are we justified in holding that it was intended to apply to a passenger outside of or upon a passenger conveyance, when the language used is that it was to apply only to a passenger in a passenger conveyance? There is nothing in the object sought to be attained by this contract of insurance to justify us in giving a broader meaning to this clause. The policy insured against bodily injuries effected through external, violent or accidental means, without regard to the position of the insured at the time the injuries were sustained, and it fixed a gross sum to be paid to the beneficiary where death resulted from such injuries. There was no limitation as to the place in which the insured was to be when such injuries were sustained, and the liability of the defendant under this clause of the policy is conceded and has been discharged. But in addition to the payment of the sum of money, under these circumstances, the defendant was willing to double its liability in case the deceased should sustain injuries when in a particular place, surrounded by such safeguards that there would be less probability of injury. It is quite apparent that a passenger upon a railroad train is much less exposed to accident when in the car than when approaching the car or when upon the platform, either entering or alighting from it. Many cases have commented upon the fact that a platform of a car in motion is not a safe place for a passenger to ride. Many things are liable to happen to a train in motion exposing a passenger upon

the platform to danger, to which he would not be exposed if in the car. And this defendant had a right to limit its liability to pay double the amount to the beneficiary when death resulted from injuries in a case where, from the position of the insured, he would be comparatively safe, and the probability of his sustaining injuries under the circumstances quite remote. It would seem, therefore, giving this clause the meaning that the language used would indicate, and considering the object sought to be obtained, that the court would not be justified in extending this construction so as to apply this clause to a death resulting from the injuries specified, as stated in the agreed statement of facts.

An examination of the authorities cited by counsel, and those we have been able to find, where clauses of this character have been construed by the courts, confirms the view above expressed. The decision of the United States Circuit Court of Appeals, in the case of *Ætna Life Insurance Co. v. Vandecar* (57 U. S. App. 446) is an express authority for the view we have taken of this clause. In that case the court says: "The words 'in a passenger conveyance,' were doubtless used advisedly and for the express purpose of limiting the defendant's liability. The reason for so doing is at once apparent; the place specified in the contract, 'in a passenger conveyance,' is a place of little or no danger, and the risk assumed is slight, while the platform of a conveyance, using the motive power described in the contract, and especially as in this case, the platform of a railway car, is an exceedingly dangerous place when the train, to which the car is attached, is in motion." This case is not unlike that of *London Assurance Corporation v. Thompson* (22 App. Div. 68), where under the policy the liability of the defendant was limited to an insurance upon naval stores when in sheds or warehouses. We held that the policy did not attach to naval stores upon the trains or in the yards, or being shipped upon vessels or which were not actually in the sheds or warehouses at the time of the fire.

The case relied on by the counsel for the plaintiff (*Theobald v. Railway Passengers' Assurance Co.*, 26 Eng. Law & Eq. Reports, 432) is distinguishable from the case at bar. The policy in that case insured the holder against any accident that happened to him "from railway accident whilst travelling in any class carriage on any

line of railway." The assured was a passenger on a railway train and was injured in getting off the train after it had stopped; and it was held to be a railway accident while traveling in a railroad carriage, within the meaning of the policy. The language used was evidently intended to apply to a passenger using either of the various classes in which English railway trains are divided, rather than to limit the operation of insurance to injuries sustained when he was in the passenger conveyance. And the observation of the court in deciding the case showed that the question presented was, not as to whether the policy was to attach to an injury when the assured was actually in a railroad car, but whether or not the assured was traveling in a carriage after the train had stopped, and whether an injury sustained by a passenger when alighting from a train could be a railway accident. The language there was quite different from clause "f" attached to the policy in this action. Clause "f" of this policy was not by its terms to apply to a person injured by a railroad accident while traveling upon or in a railway train, but the double liability was confined to injuries sustained by the assured while riding "in any passenger conveyance." The case of *Northrup v. Railway Passenger Assurance Co.* (43 N. Y. 516), which cited with approval the case of *Theobald v. Railway Passengers' Assurance Co.* (*supra*), presented a question similar to that in the last-named case.

Counsel for the plaintiff in stating his contention says that the word "in" is ordinarily accepted as an equivalent of the word "on;" and in construing this clause of the policy he contends that the deceased, while riding as a passenger on a passenger conveyance, steam, cable or electricity, is entitled to the benefit of the clause, that is, if he met his death while traveling as a passenger. We cannot agree with this contention. If such had been the intention of the parties different words would have been used, and the section would not have been limited to injuries sustained while riding as a passenger in a passenger conveyance.

We are of the opinion, therefore, that the defendant is entitled to judgment, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment ordered for defendant, with costs.

KATE T. WOOLSEY, as Executrix of EDWARD J. WOOLSEY, Deceased,  
Appellant, v. WILLARD P. SHAW, Respondent.

*Motion for leave to serve an amended reply to a counterclaim — when not too late — a claim that the reply was sufficient does not preclude it — an amendment not allowed to present an objection not raised in the original reply.*

A plaintiff is not guilty of *laches* in delaying to make a motion for leave to serve an amended reply to a counterclaim for professional services set up in the answer, by substituting for a denial that such services were reasonably worth over the sum of \$400, an allegation that such services as rendered were worth no more than \$100, until after the completion of the defendant's testimony, notwithstanding the fact that the defendant moved for judgment upon his counterclaim for professional services at the close of the plaintiff's case, upon the ground that the reply was not sufficient to put in issue the performance thereof by the defendant or the value of such services, and that such motion was sustained.

*Semble*, that the proper time to present such a question is at the close of the defendant's case.

The plaintiff is not estopped from making an application at Special Term for leave to amend, because he has claimed at the trial before the referee that the reply was sufficient, but he should not be permitted to amend the reply by inserting an allegation that the services alleged in the bill of particulars, as constituting the services specified in the counterclaim, were performed and rendered at the request and under the direction of persons other than the plaintiff's testator, there having been no intimation of such an objection to the defendant's claim in the original reply.

APPEAL by the plaintiff, Kate T. Woolsey, as executrix of Edward J. Woolsey, deceased, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 28th day of June, 1898, denying the plaintiff's motion for leave to serve an amended reply to a counterclaim set up in the defendant's answer.

*William Barnes*, for the appellant.

*C. F. Goddard*, for the respondent.

INGRAHAM, J.:

The action was brought by plaintiff's testator in his lifetime to recover an amount alleged to be due to him. The defendant in his

answer set up several counterclaims, one of which was to recover for services rendered by the defendant as an attorney at law to the plaintiff's testator, the value of which services the defendant alleged was \$2,642.17. The plaintiff replied to such counterclaim by alleging that the defendant performed certain professional services for the plaintiff during the time mentioned in the answer, but denied that such services were reasonably worth over the sum of \$400. The case was referred to a referee, but before the action was brought on for trial the plaintiff's testator died. Subsequently the action was revived by the present plaintiff as executrix of the original plaintiff. A new referee was appointed, and the action was finally brought on for trial on January 7, 1898. At the close of the plaintiff's case, on February 10, 1898, the defendant moved for judgment upon this counterclaim for professional services upon the ground that the reply was not sufficient to put in issue the performance by the defendant of the services for the plaintiff's testator, or the value of such services performed, and it seems that the referee sustained the defendant's contention. Subsequently evidence was offered by the defendant to sustain the other defense and counterclaims contained in his answer, and upon the defendant's resting, the question as to the sufficiency of the reply was again discussed before the referee. The referee adhered to his decision. Counsel for plaintiff then asked leave to amend the reply, but the referee declined to entertain that motion, intimating that such application should be made to the court, and subsequently adjourned the hearing to enable the plaintiff to make an application to the court. Pending that adjournment a motion to amend the reply was made and denied. The learned judge in denying this motion places it upon the ground that the plaintiff, having challenged the judgment of the referee upon the sufficiency of the reply, the proper redress was by an appeal. An examination of the original reply would seem to indicate that the plaintiff intended to allege in answer to this counterclaim for professional services that such services as rendered were worth no more than \$400. This reply is quite inartificial and probably is subject to the criticism of the defendant's counsel, that it is not sufficient to put at issue the allegations of the service rendered by the defendant to the plaintiff, and their value. The sufficiency of this reply, however, to put those facts in issue never seems to have been challenged

by the defendant's counsel until after the plaintiff had closed his case before the referee on February 10, 1898.

We do not think that the plaintiff can be said to have been guilty of *laches* in not making his motion for leave to amend until after the testimony of the defendant had been completed. Upon the completion of the testimony the question was again raised and discussed before the referee, who adhered to his former decision. That was at the close of the defendant's case, and, strictly speaking, was the proper time at which to present the question to the referee. The application was not then denied by the referee upon the ground that such an amendment would be improper, but he declined to entertain the application, referring the party to the court and granting an adjournment for the purpose of allowing the plaintiff to make such an application to the court. The fact that such an application was made to the referee when he refused to entertain it certainly would not estop the plaintiff from applying to the court for leave to amend, as there was no exercise by the referee of his discretion upon the application.

Nor do we think that the plaintiff is estopped from making this application because she had claimed before the referee that the reply was sufficient. The referee having decided against her contention, she then either had to take the risk of a successful appeal or apply to the court for leave to make an amendment which would present the issue, which it is quite clear from an examination of the original reply the pleader intended to present. The defendant can have no difficulty in proving the value of the services rendered, and there seems to be no reason why the plaintiff should be compelled to accept his estimate of their value, without dispute, because of a mistake in the form of the denial used in the reply. The plaintiff seeks, however, to amend the reply by inserting an allegation that the services alleged in the bill of particulars as constituting the services referred to in the counterclaim were performed and rendered at the request and direction of others than the plaintiff's testator. We think it would be unjust at this time to allow such a defense to be interposed. In the original reply there is no intimation of such an objection to the defendant's claim, and now since the death of the original party, the defendant would be precluded from testifying as to the communications with the original



plaintiff in relation to the services. We think, therefore, that the order appealed from should be reversed and the plaintiff allowed to serve the proposed reply upon condition that the 4th clause thereof be stricken out, the plaintiff, as a condition for such amendment, to pay to the defendant all costs after service of notice of trial, and ten dollars costs of opposing this motion. The plaintiff further to stipulate that all proceedings before the referee stand, the defendant's case to be reopened and the defendant to have leave to submit such further evidence as he shall desire. No costs of this appeal.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Order reversed and plaintiff allowed to serve proposed reply on condition that the 4th clause be stricken out, the plaintiff, as a condition for such amendment, to pay to defendant all costs after service of notice of trial and ten dollars costs of opposing this motion, and further to stipulate that all proceedings before the referee stand, the defendant's case to be reopened and the defendant to have leave to submit such further evidence as he shall desire. No costs of this appeal.

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THEODORE W. STEMMLER and FRANKLIN A. STEMMLER, Respondents, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

*New York city — claim against it, under chapter 543, Laws of 1894, for the unpaid salary of a District Court judge — what is not a sufficient compliance with the act.*

In the enforcement of a claim under chapter 543 of the Laws of 1894, authorizing the board of estimate and apportionment of the city of New York to ascertain and determine the amount of the unpaid salary belonging to one Stemmler, as a justice of the District Court in the city of New York, from January 1, 1870, to October 15, 1873, the claimant must allege and prove that every provision of the act has been strictly complied with.

The mere insertion in the tax levy of 1895 by the board of estimate and apportionment of a provision auditing and allowing the claim at a certain sum, does not, in the absence of any certificate of such board that the salary had not been paid, or as to the amount of the salary for the period mentioned, and in the absence of evidence that such certificate, with the proofs, were filed in the

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office of the comptroller, constitute a compliance with the requirements of that act.

*Semble*, that, under such action of the board of estimate and apportionment, the claimant would not be entitled, in any event, to recover more than the sum specified by that board, and would not be entitled to interest thereon.

APPEAL by the defendant, The Mayor, Aldermen and Commonalty of the City of New York, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 21st day of March, 1898, upon the decision of the court, rendered after a trial at the New York Trial Term, before the court without a jury, with notice of an intention to bring up for review upon such appeal the exceptions filed to such decision.

*Theodore Connoly*, for the appellant.

*Delos McCurdy*, for the respondents.

INGRAHAM, J.:

The complaint alleges that at a meeting of the board of estimate and apportionment of the city of New York, there was presented to the board, pursuant to chapter 543 of the Laws of 1894, the proofs required by section 1 of that act, and that "thereupon said board of estimate and apportionment of the city of New York, pursuant to said act, *ascertained* and determined that the amount of the unpaid salary belonging to said John A. Stemmler, as such justice of the District Court in the city of New York, from January 1, 1870, to October 15, 1873, at the rates fixed by law and paid to the justices of the other District Courts in said city for the same period, was the sum of \$35,000, and audited and allowed the claim of the heirs of John A. Stemmler for salary of John A. Stemmler as justice of the Seventh Judicial District Court from January 1, 1870, to October 15, 1873, in pursuance of chapter 543 of the Laws of 1894, at the sum of thirty-five thousand dollars;" that thereafter the certificate of the board of estimate and apportionment, declaring the amount of unpaid salary belonging to John A. Stemmler, deceased, to be \$35,000, and signed by all the members thereof, and the proofs presented to the board of estimate and apportion-

ment, as aforesaid, were filed with the comptroller in his office in the city of New York, and the action was brought to recover the said amount of \$35,000, with interest.

The answer of the defendant admits that the board of estimate and apportionment ascertained and determined that the amount of the unpaid salary belonging to the said Stemmler was \$35,000; but denies that the certificate of the said board, declaring the amount of unpaid salary belonging to the said Stemmler, and the proof presented to such board, had been filed with the comptroller of the city of New York, and alleges that the board of estimate and apportionment on December 31, 1894, included in the final estimate made for the year 1895, the following item: "Claim of heirs of John A. Stemmler, or their representatives, for the salary of John A. Stemmler, as justice of the seventh judicial district, from January 1, 1870, to October 15, 1873, audited and allowed in pursuance of chapter 543, Laws of 1894, at a sum not exceeding \$35,000;" that no other provision has ever been made for and in respect to the payment of the plaintiff's claim; that the audit and allowance of the plaintiff's claim by the board of estimate and apportionment, if legally made and binding upon the defendant, is final and conclusive, and that the plaintiff can recover no further or other sum in excess of said \$35,000 until further and other provision is made by action of the board of estimate and apportionment allowing a further and additional sum; and the defendant denies any knowledge or information sufficient to form a belief as to each and every allegation in said complaint contained, not above admitted or denied.

It is proper to call attention to the remarkable character of this act. The Legislature has, almost twenty-five years after the commencement of the term of this justice of a District Court, and almost twenty years after the term ended, imposed upon the city of New York a liability for the salary of said justice for the period during which he performed no service, and when the city had paid such salary to the person to whom the certificate of election had been awarded and who actually performed the service. During that period the city was bound to pay to the person declared elected and who performed the duties of the office the salary of the office. It had no part in determining who was elected; it acted for the State in collecting from the taxpayers the salary fixed by law and paying

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it to the officer who actually held the office. This act compels the present taxpayers to pay this sum again to the heirs of the person who was not the incumbent of the office and who performed no service to the public. We think that, before the city of New York can be held liable in an action at law to recover the amount directed to be paid by this act, the plaintiff must allege and prove that every provision of the act has been strictly complied with.

The act imposes, first, a duty upon the board of estimate and apportionment of the city of New York. This board is authorized and directed to meet and ascertain the amount of said unpaid salary belonging to the said John A. Stemmler as said justice, at the rate fixed by law and paid to the justices of the other District Courts in the city for the same period, namely, the portion of the term for which he was elected prior to October 15, 1873, or any part of that time pending his contest for said office and while it was wrongfully occupied by one Joseph McGuire, which was to be established by a certified copy of the judgment of the Supreme Court declaring that Stemmler was duly elected to said office, and that the said McGuire usurped and unlawfully held such office during said period prior to October 15, 1873, and by a certificate from the comptroller of the city of New York that no part of the salary for said period had been paid to John A. Stemmler or his representatives. It is admitted in the answer that at a meeting of the board of estimate and apportionment of the city of New York there was presented to the board, pursuant to this law, the proof therein required; and that, pursuant to said act, the board ascertained and determined that the amount of unpaid salary belonging to the said Stemmler from January 1, 1870, to October 15, 1873, was the sum of \$35,000. The act further provided that "the said comptroller, upon such certificate and proofs aforesaid being filed in his office, shall pay the amount of the said unpaid salary, with lawful interest thereon from the day last aforesaid, to the heirs of the said John A. Stemmler or their representatives." The complaint alleges that the certificate of the board of estimate and apportionment "declaring the amount of said unpaid salary belonging to said John A. Stemmler, deceased, to be thirty-five thousand dollars, and signed by all the members thereof, and the proofs presented to said board of estimate and apportionment as aforesaid were filed with said comptroller in his office in

the city of New York." This allegation is expressly denied in the answer, and we think that there was no evidence to sustain it.

The plaintiffs proved by the clerk of the board of estimate and apportionment that he (the clerk) had with him the record of that board, which contained the final estimate for the year 1895, made December 31, 1894, which book he produced. From that was read, as a part of such final estimate, a provision that the claim of the heirs of the said Stemmler for his salary as such justice from January 1, 1870, to October 15, 1873, was audited and allowed in pursuance of chapter 543 of the Laws of 1894, at a sum not exceeding \$35,000, and that this final estimate was adopted by the unanimous vote of the board. There was also read from the same record a copy of the judgment of the Supreme Court which determined that Stemmler was entitled to the office, but there was no evidence to show that the provision for the final estimate for the year 1895 or that this judgment was on file in the office of the comptroller. The witness, on being asked whether it was on file in the comptroller's office, says that he thinks it was referred to the comptroller, but could not say what was done with it. He subsequently testified that the record produced by him did not come from the comptroller's office; that it came from the office of the board of estimate and apportionment. From such record was also read the statement that at a prior meeting of the board Delos McCurdy presented papers in the matter of the claim of John A. Stemmler for salary as justice of the Seventh District Court, and that the mayor moved that they be referred to the comptroller and counsel to the corporation, which was adopted, and the witness then says that he does not remember who took the papers. He says he thinks they were sent to the comptroller, but he is not sure. There was further evidence from the same record introduced to show that there was presented to the board a certificate of the comptroller that no part of the salary of the justice of the District Court in the city of New York had been paid to Stemmler or his representatives for any portion of the term of said office prior to May 1, 1873. Counsel to the corporation then objected to the reading of the paper upon the ground that it did not meet the requirements of the statute. It was, however, received by the court, and to that the defendant excepted. It was subsequently admitted that these

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papers were submitted to the board of estimate and apportionment and handed to the comptroller when thus referred, as a member of the board of estimate and apportionment; but there was no admission and no proof that the papers were ever filed in the office of the comptroller. There was evidence subsequently offered of an unexpended balance of appropriations in 1895, and that on the 31st day of July, 1894, the date of the demand upon the board of estimate and apportionment, the unexpended appropriations in the city treasury amounted to upwards of \$222,000. And then with a calculation of interest on the \$35,000 to January 1, 1896, the court directed a verdict for the full amount, viz., \$85,994.86.

There is no evidence that the board of estimate and apportionment, or a majority of the members thereof, certified that no portion of said salary had been paid to Stemmler, or that they certified the amount of salary for said period; nor is there any evidence that such certificate, with the proofs aforesaid, was filed in the office of the comptroller. There is evidence that the said board, in making up the final estimate for the tax levy for the year 1895, included therein the claim of the heirs of Stemmler, and audited and allowed such claim, in pursuance of the act of 1894, at a sum not exceeding \$35,000; but this seems to have been in pursuance of section 2 of that act, which provides that, if necessary, the amount of the payment made by the comptroller was to be inserted in the tax levy for the following year. The statute imposed a duty upon the board of estimate and apportionment. It was required to meet and ascertain the amount of the unpaid salary belonging to Stemmler as such justice at the rate fixed by law for the period named, and then, upon the certificate of the said board that no part of said salary had been paid to Stemmler or to his representatives, which certificate was also to fix the amount of salary for such period, the comptroller, upon such certificate and proofs being filed in his office, was to pay the amount of the unpaid salary. This obligation upon the comptroller to pay this sum of money does not arise until such certificate should have been made by said board or a majority of the members thereof, and such certificate and proofs submitted to the said board should have been filed in the office of the comptroller. We do not think that the insertion in the tax levy for 1895, by the board of estimate and apportionment, of a provision auditing and allowing the claims

of the heirs of John A. Stemmler at a sum not exceeding \$35,000 is a compliance with the provisions of this act. The 1st section of the statute has no relation to the act of the board of estimate and apportionment in preparing the tax levy for the year 1895. The duty was imposed upon such board of ascertaining upon proofs, the nature of which proofs was indicated, certain facts; and upon those facts being ascertained by the board, it was then directed to embody the result in a certificate, and upon such certificate, with the proofs upon which the board acted, being filed in the office of the comptroller, the latter was directed to pay the amount of the said unpaid salary with lawful interest thereof. An audit of the claim against the city by the board of estimate and apportionment as part of a tax levy for a subsequent year was not such a certificate. This audit did not certify that the salary had not been paid to Stemmler or his representatives, nor did it certify the amount of the salary for the period. It simply audited and allowed a claim against the city for an amount not exceeding \$35,000. The utmost that could be claimed was that there was an audit of a claim against the city, but it did not purport upon its face to audit or adjust the claim at that amount. Upon such audit the plaintiffs would not be entitled to recover more than the amount audited and allowed, which was not to exceed \$35,000, yet this judgment allows against the city a claim of upwards of \$86,000. If the audit of the city is relied upon to sustain a cause of action against the defendant, the claim must be confined to the amount of the audit, which was not to exceed \$35,000. This amount must have been intended to include interest, as the total salary for the period would have been not more than \$22,000. The resolution of the board of estimate and apportionment fails to certify to the facts which the board were required to ascertain and certify, but even if this resolution were a sufficient certificate under the statute, as there was no evidence that the certificate or the proofs required to be furnished before the board of estimate and apportionment were ever filed in the comptroller's office, no obligation arose upon the comptroller to pay.

We think, therefore, that the evidence fails to show that the provisions of the statute were complied with, or that there was any liability of the city; and as, for the reasons before stated, this judgment must be reversed, it is not necessary for us now to determine

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the other points taken by the counsel to the corporation. The question as to the constitutionality of this act is not free from doubt. Nor do we wish to be understood as intimating an opinion that, even upon the necessary certificates being filed, a cause of action arose against the city in favor of the plaintiffs under the statute. We place our reversal of the judgment upon the fact that, as the statute had not been complied with, no obligation of the city or of the comptroller to make any payment under the statute accrued.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

EMMA MERGES, Plaintiff, v. MARY RINGLER and Others,  
Respondents.

JACOB F. OPFERMANN, by J. ASPINWALL HODGE, JR., his Guardian  
ad Litem, Plaintiff, v. PHILLIPINE OPFERMANN and Others,  
Defendants.

ROBERT J. KING, JR., Purchaser, Appellant.

*Judicial sale—objections to the title—a variation of one-half inch in 141 feet—  
encroachment of buildings upon adjoining land, and upon the street.*

On an application by a purchaser at a judicial sale to be relieved from his purchase, a variation of a half inch in a distance of 141 feet does not constitute a substantial defect, where it is not disputed but that the purchaser will obtain a good title to all property included within the boundaries as described in the advertisement of sale.

The fact that buildings on abutting property encroach one-half inch upon the lot purchased, does not justify the purchaser in objecting to the title, where there is no evidence that the encroachment actually impairs, to any extent, the value of the property.

The mere fact that some unimportant buildings on the premises sold encroach, to a small extent, upon adjacent premises, does not entitle the party making the purchase to be relieved therefrom, where his right to use the adjacent land for the support of the walls of such buildings is established by adverse pos-

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session, and where he has obtained all of the property that he had any reason to suppose that he was to acquire by the purchase.

Where buildings upon the property purchased, which is situated in the city of New York, have encroached for many years, in their present condition, upon a street without objection on the part of the municipal authorities to the continuance of the encroachment, and the extent of the encroachment is such that it is not probable that such an objection will be taken, and it appears that the city, under statutory provision (Chap. 410 of the Laws of 1892, as amended by chap. 610 of the Laws of 1895), would not be allowed to remove the wall, an objection to the title, based upon such encroachment, will not be sustained.

APPEAL by the purchaser, Robert J. King, Jr., from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of August, 1898, denying his motion to be relieved from his purchase made at a sale had under judgments in the above-entitled actions.

The first above-entitled action was brought for the partition of certain real estate of which Frederick Oppermann, Jr., died seized. Before judgment was entered in the first above-entitled action, the second above-entitled action was brought to enjoin the executors of Frederick Oppermann, Jr., deceased, from disposing of the personal property of his estate, separate and apart from the real property. After the entry of the judgment of partition and sale, judgment, in favor of the plaintiff, was rendered in the second above-entitled action, whereby it was directed that the personal property of said Frederick Oppermann, Jr., should be sold in one parcel with the property sought to be partitioned in the first above-entitled action, and at the sale had in pursuance of such direction the appellant, Robert J. King, Jr., purchased the entire property.

*Elihu Root*, for the appellant.

*Lorenz Zeller*, for the respondents Mary Ringler and others.

*J. Aspinwall Hodge, Jr.*, guardian *ad litem*, for the respondent Jacob F. Oppermann.

INGRAHAM, J. :

A purchaser at a sale made under a judicial decree is entitled to all property and title which the referee undertook to sell and which he rightfully supposed he was to receive; but "a purchaser upon

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such a sale will not be relieved on account of defects in the property or the title thereto, of which he had notice, and in reference to which he made his bid, and the court will not permit him to abandon his contract without seeing that the object of the purchase is defeated and that he would be injured by the enforcement of the contract. If every minute and critical objection to a judicial sale is suffered to prevail, it will be attended with much inconvenience and embarrassment. A purchaser claiming to be discharged from his contract should, therefore, make out a fair and plain case for relief; and it is not every defect in the subject sold or variation from the description that will avail him. He will not be suffered to speculate at such sales, and, if he happens to make a bad bargain, to repudiate it and abandon his purchase on some nice but immaterial objection. If he gets substantially what he bargains for he must complete the purchase and take his deed; and, in some cases, the court will compel him to take a compensation for any deficiency. The court will weigh the object and inducement of the purchaser, and, looking to the merits and substantial justice of each particular case, if the sale be fair, relieve or not from the purchase, according as the character of the transaction and circumstances may appear to require." (*Riggs v. Pursell*, 66 N. Y. 198.) This rule was not at all questioned on the subsequent appeal to the Court of Appeals in the same case, reported in 74 New York, 370; and we are to examine the objections taken by the purchaser to the title and ascertain whether within this rule they are substantial, and whether the appellant has made it appear that on completing the purchase he will not obtain all the property which the referee undertook to sell or he rightfully supposed he was to receive.

The objections of the purchaser may be divided into three classes: *First*, encroachment upon adjoining premises by the buildings erected upon the premises sold; *second*, encroachment upon the premises sold by buildings on adjoining premises; and, *third*, encroachments of buildings on the premises sold upon the street abutting in front of such premises. The premises described in the advertisement of sale consisted of three separate parcels of land, fronting upon Forty-fourth and Forty-fifth streets, in the city of New York, west of First avenue. The most northerly piece of

property abuts upon the northerly side of Forty-fifth street, with a frontage of 159 feet upon the street, and running back 100 feet and 5 inches to the center line of the block between Forty-fifth and Forty-sixth streets. The piece of property between Forty-fourth and Forty-fifth streets consists of a piece of ground, with frontage of 150 feet upon each of the streets, running from street to street; and the parcel of land situated on the south side of Forty-fourth street consists of a plot of land 125 feet upon the street, and 100 feet and 5 inches in depth. Upon these various parcels of land are erected buildings which had been used as a brewery and stables, and also a building that had been leased. The purchaser claimed, and introduced evidence of surveyors tending to show, that certain buildings upon the premises in question encroached upon the adjacent premises; that certain buildings upon adjacent premises encroached upon the property sold; that certain of the buildings fronting on the street encroached upon the street, and, in consequence of such encroachments, asks to be relieved of his purchase.

The first question to be determined is, whether or not such encroachments were a substantial injury to the property. It is quite apparent that an encroachment might be so insignificant that no injury could result. The property was sold by metes and bounds, and it is not claimed but that the purchaser will obtain a good title to all of the property included within the boundaries specified in the advertisement of sale. But he claims that, because of such encroachments, he will not receive a good title to the buildings on the property purchased. It appeared from the affidavit of the surveyor, presented by the purchaser, that the building on the property on the west of the plot on the north side of Forty-fifth street encroaches one-half inch upon the plot purchased the whole length of the wall, a distance about sixty-three feet. There is also a claim that, upon the westerly line of the plot fronting upon the northerly side of Forty-fourth street, the building of the owner adjoining on the west encroaches one-half inch upon the plot purchased for a distance of about twenty-five feet, the encroachment of one-half an inch continuing nine and one-half feet, and then gradually wearing down to nothing at a point on the northerly side of Forty-fourth street. The existence of these encroachments is quite doubtful, even to the extent claimed by the purchaser. Other surveys show that the encroachment

is much less, some showing that it does not exist at all, while other surveyors testify that it is one-half inch in front, but correct in the rear. Considering the size of the land and the uncertainty of making any measurement of this distance within a half inch, this encroachment, if it existed, must, I think, be considered to be so small as not to be a substantial objection to the purchase. The bounds of the property, as described in the advertisement of sale, were to commence on the northerly side of Forty-fifth street, distant 141 feet westerly upon the northwest corner of Forty-fifth street and First avenue. A variation of a half inch in that distance would be so small that it is quite clear it would have no appreciable effect upon the value of the property, and the same may be said about the encroachment upon the plot on the south side of Forty-fourth street. There seems to be some dispute among the surveyors as to whether or not this building encroaches upon the premises sold; but the encroachment, if it exists, is so small, and evidently is not of substance, considering the size of the land; and there was no evidence that these encroachments, if they existed, did actually impair to any extent the value of the property.

Great stress is laid, however, upon the encroachment of buildings on the property purchased upon adjacent property and upon the street. In considering these encroachments, and in determining whether or not they are substantial injuries to the property sold, we must bear in mind the character of the buildings, the purposes to which they were put, and the possibility of the purchaser being interfered with in the possession of these buildings as they existed at the time of the purchase. In determining questions of this character, each case must be determined upon the facts presented. No hard and fast rule can be laid down that one inch or two inches of encroachment, irrespective of the nature of the building and the effect of such encroachment upon the value of the property, will be sufficient to justify the court in relieving a purchaser of his purchase. The cases cited in which the court has relieved a purchaser, where an encroachment of an inch and a half or two inches has existed, are cases where a substantial permanent building had been erected upon the property which encroached upon property other than that of the vendor, or where the encroachment was upon the property which the vendor had agreed to sell, and where the court could see

from the evidence that, in consequence of such encroachment, the owner was subject to an attack by the owner of the adjacent property, so that the purchaser might be put to the burden and expense of defending a lawsuit or removing his wall, which would be a substantial injury to his property. But they were disposed of upon the particular facts in each case. Where, however, from the facts appearing upon the application, it is reasonably certain that injury to the purchaser could not follow, and that no successful attack could be made which would prevent him from using the buildings in the condition in which they were at the time of the purchase, the court would not be justified in relieving a purchaser. Where a building encroaches upon adjacent property, the premises having been sold by metes and bounds, the purchaser is not entitled to a good title to the property upon which his building encroaches. He is entitled to the property purchased, and also to the buildings upon the property and the right to use them as they are situated at the time of the purchase; but the mere fact that some unimportant buildings encroach to a small extent upon adjacent premises when, from the facts and circumstances disclosed, it is certain that no attack can be made upon the right of the purchaser to use the buildings as they existed at the time of the purchase, as long as he may desire to use them, he certainly obtains all of the property that he had any reason to suppose he was to acquire by the purchase.

An examination of the record in this case has satisfied us that these alleged encroachments, the extent of which is seriously disputed by witnesses who had made surveys of the premises, are not substantial injuries to the property purchased. Most of the buildings which encroach upon the adjacent premises are old buildings that have been in use many years, and it would seem from the evidence produced by the respondents that the purchaser has acquired the right to use the adjacent lands for the support of his walls by implied grant or adverse possession. The question here is, not whether he has acquired a good title to the land upon which his walls are built, but whether, by reason of such adverse possession, he has acquired a right to have the walls remain in the condition they are for the support of his buildings so long as the buildings shall stand upon the property. Whether or not, in any case a purchaser should be compelled to accept a title based only upon the adverse possession, it is not

necessary for us to determine on this appeal. No portion of this property is claimed by adverse possession. The premises purchased by the appellant which are included within the dimensions given in the advertisement of sale will be assured to him by the conveyance, and in addition he will acquire by the conveyance a right to have a few inches of certain of the walls of the buildings upon the premises supported by the adjacent lands. In none of these buildings does it appear, as it did in the case of *Spero v. Shultz* (14 App. Div. 424), that the entire wall was upon the land of another, and, as was said by CULLEN, J., in the case of *German-American Real Estate Co. v. Meyers* (32 App. Div. 41): "By the terms of sale the purchaser did not buy any particular buildings or structures, but a certain plot of land with the structures that were on it. Therefore, if he can get a good title to the land purchased, and the right to maintain the structures on it as they existed at the time of his purchase, he gets all he bargained for." I think the evidence submitted in this case shows that the purchaser will get such a title. It appears affirmatively that all of the parties owning the adjacent premises on the west of plot 4 of the land in question were of full age, and not under a disability, so that the statute will run as against them, and it appears with reasonable certainty that this purchaser will get the property that he purchased together with the right to use the buildings thereon in the condition which they are in at present and as long as he desires.

As to the encroachments upon the street, it is quite apparent that they are not a substantial objection to the property. These buildings have been there for many years in their present condition. There has been no objection by the municipal authorities to their continuance, and the extent of the encroachment is such that it is not probable that such an objection will be now taken; but whatever objection the city could make, it is quite apparent that under chapter 410 of the Laws of 1882 (§ 471), as amended by chapter 610 of the Laws of 1896, the city would not be allowed to remove the wall, and we do not, therefore, think that the objection is substantial. On the whole case we are satisfied that the objections taken by the purchaser are not such as will justify the court in relieving him from his purchase.

Certain provisions were inserted in the order to protect the purchaser from any possible expense or injury on account of these

encroachments. No appeal by the respondent is taken from that portion of the order, and it is quite apparent that if there should be any incidental expense to which the appellant could be put in consequence of any of these encroachments, they will be met by the fund provided for by this order, and as this order stands the appellant is entirely protected.

Upon the whole case we think the order appealed from is right and should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., BARRETT, RUMSEY and McLAUGHLIN, JJ., concurred.

BARRETT, J. (concurring):

I concur in the affirmance of the order. The encroachments were insignificant, and, under all the circumstances, did not furnish ground for rejecting the title. The case is an extraordinary one in many respects — by reason of the size and nature of the property; the knowledge of the real purchasers of its exact condition, and the satisfactory evidence of adverse possession. Every such case must depend more or less upon its own particular facts, and it cannot be said here that reasonable doubt was thrown upon the title. In fact the attitude of the respondents appeals much more strongly to a court of equity than that of the appellant. The title being free from reasonable doubt, it was proper for the court to allow compensation for the material defects which appeared, and to appoint a referee to determine the amount which should be awarded. This course was adopted in at least one case in this State (*King v. Bardeau*, 6 Johns. Ch. 38, 44), and there are numerous other cases containing dicta that a purchaser may be forced to accept compensation as an indemnity against trivial defects (*Smyth v. Sturges*, 108 N. Y. 498; *Winne v. Reynolds*, 6 Paige, 407; *Keating v. Gunther*, 10 N. Y. Supp. 734). The cases cited to the contrary are not in point. (*Sternberger v. McGovern*, 56 N. Y. 12; *Martin v. Colby*, 42 Hun, 1; *Bonnet v. Babbage*, 19 N. Y. Supp. 934; *Subriski v. Veloski*, 25 Abb. N. C. 185.) These cases hold that, in the case of a contract for the exchange of real property, if one of the parties is unable to perform in full, he will not be forced to convey what he has and pay damages for the balance of the property, and that if the vendor in a contract of sale cannot obtain a conveyance of his wife's right

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of dower, the vendee may not insist upon a conveyance of the vendor's own interest and damages for the failure to perform in full.

In all of these cases there was a substantial breach of the contract which would have justified the vendee in rescinding it. The vendor had forfeited all rights under the contract, and the sole question related to the measure of relief which the vendee might obtain. But here the vendors have not forfeited their rights. The defects are not of sufficient substance to justify a rejection of the title, and the court is practically enforcing the agreement in the vendors' favor. There is no authority holding that in such a case equity may not do full justice by awarding compensation for immaterial defects. The sum reserved is large, but not in proportion to the value of the property; and it is not awarded to the appellant, but simply set apart as a fund out of which to pay him what, if anything, the referee shall find to be reasonable.

RUMSEY and McLAUGHLIN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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WILLIAM E. D. STOKES, Appellant, v. EDWARD S. STOKES,  
Respondent.

*New trial — motion therefor on the ground of newly-discovered evidence — proof of an oral agreement contemporaneous with a deed and to the same effect.*

In an action on certain notes the answer admitted the defendant's indebtedness, but alleged the conversion by the plaintiff of certain bonds held to secure their payment, and it was decided by the Court of Appeals, in affirmance of the judgment of the trial court, that the burden of proof being upon the defendant to show that the bonds in question were not held by the plaintiff as collateral security for any obligation of the defendant other than the notes in suit, and there being evidence tending to show the possession by the plaintiff of certain notes of one Read which had been guaranteed by the defendant, the conversion had not been established.

*Held*, that a motion for a new trial on the ground of mistake and surprise and because of newly-discovered evidence — based on the affidavit of Read that prior to the trial of the action he had conveyed certain land to the plaintiff by an instrument in writing, and under a contemporaneous oral agreement to the same effect, by which the plaintiff covenanted to discharge the indebtedness to himself, evidenced by the Read notes, as part consideration for the conveyance



of the property, which fact was concealed from the defendant by both parties to the deed and was not known to him until shortly before the motion was made—should be granted.

In such a case the contemporaneous parol agreement is admissible in evidence, it being a mere restatement of the legal effect of the writing signed by the parties, not tending to vary the written agreement, but rather to supplement it, and thus show their real agreement.

APPEAL by the plaintiff, William E. D. Stokes, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 16th day of May, 1898, granting the defendant's motion for a new trial made upon the grounds of mistake and surprise and because of newly-discovered evidence.

*Albert B. Boardman*, for the appellant.

*James C. Carter*, for the respondent.

INGRAHAM, J. :

The court below having granted the defendant in this action a new trial, we are asked to reverse that order. The record is very voluminous, and a statement of a few of the salient facts will be sufficient to show the reason for our decision of this appeal. The action was brought to recover upon four certain promissory notes made by the defendant to the plaintiff. These notes were secured by a deposit as collateral security of 125 bonds of the Hoffman House. Subsequent to the deposit of these bonds as security, and on the 18th of August, 1891, an agreement between the plaintiff and the defendant was made, and as security for the performance of that agreement by the defendant, and for the obligation incurred by him thereunder, 150 bonds of the Hoffman House were to be delivered to the plaintiff by the defendant. These 150 bonds were to consist of the 125 already in the plaintiff's hands as security for the four notes in suit, and 25 others which the defendant was to add. It also appears to have been settled by an adjudication in an action brought in this court, and which has been affirmed by the Court of Appeals, that this August agreement between the parties was never in fact performed by the plaintiff and that it could not be enforced against the defendant. When the notes became due, the defendant tendered to the plaintiff the amount thereof and demanded the

return of the 125 bonds held as collateral security therefor. The tender was refused upon the ground that the plaintiff was entitled to retain possession of the bonds as security for other obligations of the defendant. The defendant, by his answer in this action, admitted his liability upon the notes in suit, and by way of counterclaim alleged the tender of the amount due thereon and the demand for the bonds. He also alleged a refusal, upon such demand, to return the bonds and a subsequent conversion thereof by the plaintiff. The counterclaim demanded judgment against the plaintiff for the value of the bonds so converted, less the amount due upon the notes. To this counterclaim the plaintiff replied, alleging the August contract and that the 125 Hoffman House bonds held by him were deposited under that agreement.

The action coming on for trial and the defendant having admitted his liability upon the notes, he claimed, and was allowed the affirmative, and offered evidence tending to show the tender of the amount due and the demand for the return of the bonds; the refusal and the value of the bonds, and also the record of the judgment entered in the action in this court, by which it was determined that the August agreement, under which the plaintiff claimed to hold the bonds, could not be enforced against him. This August agreement, however, recited the existence of the two notes known as the "Read notes," which the defendant had guaranteed. The result of the trial was that a verdict was directed for the plaintiff against the defendant for the full amount of the notes, and a judgment entered upon that verdict was affirmed by the General Term of the Superior Court (the court in which the action was then pending) and by the Court of Appeals. The learned judge of the Court of Appeals, upon whose casting vote the judgment was affirmed, placed his concurrence upon the ground that, the burden of proof being upon the defendant to show that the 125 bonds in question were not held by the plaintiff as collateral security for any other obligation except the notes in suit, and there being evidence tending to show the existence of these Read notes, which were guaranteed by the defendant, he had not affirmatively sustained that burden. The learned judge consequently concluded that the defendant had failed to establish the conversion alleged, and was not, therefore, entitled to a verdict

on his counterclaim. It is alleged by the defendant that there was no express claim made by the plaintiff on the trial to hold these bonds as security for the Read notes, except so far as they were mentioned in the August agreement as a part of his, defendant's, obligation.

This motion was made after the decision of the appeal by the Court of Appeals, upon two grounds: *First*, that the defendant was surprised by the evidence given upon the trial as to the Read notes and the construction placed by the Court of Appeals upon his testimony, and, *second*, upon the ground of newly-discovered evidence. It is only necessary for us to consider the latter ground in disposing of this appeal.

These two notes which were guaranteed by the defendant were given by Read to the plaintiff for money paid to Read for his personal use and for the purpose of satisfying his obligations to the corporation known as the Hoffman House, in which both the plaintiff and defendant were interested. Read, upon this motion, testified that about the time the notes, or one of them, became due, he made an agreement with the plaintiff whereby he sold to the plaintiff 33,000 acres of land owned by Read in the State of West Virginia, and that part of the consideration of that conveyance was the discharge of the indebtedness from Read to the plaintiff evidenced by the notes in question which had been guaranteed by the defendant. Read swears positively that the plaintiff promised him that if he would thus convey the tract of land, the plaintiff would, as part consideration for the conveyance, release and discharge the said notes and all the other indebtedness of Read to him. There is also produced a deed from Read to the plaintiff, dated December 19, 1891, by which Read, the party of the first part, "in consideration of seven thousand dollars and other good and valuable considerations, lawful money of the United States, paid by the party of the second part, doth hereby grant and release unto the said party of the second part, his heirs and assigns forever, all the thirty-three thousand four hundred and ninety and 20/100 acres of land, undivided," in the State of West Virginia, with a certificate of record of this deed in December, 1891, and January and February, 1892. There was also presented an agreement bearing the same date as the deed, reciting the deed and the consideration, therein expressed of

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\$7,000 and other good and valuable consideration, and providing as an agreement between the parties that "said consideration should be as follows: *First*, Seven thousand dollars for two thousand acres of said land undivided, in fee and free and clear of all incumbrances in cash or in the notes of said Stokes. When the title of said land is examined and approved, said sum to be applied on and to reduce the claim of Lloyd W. Williams under the trust deed for his benefit made by said Read to Thomas N. Williams dated 26th of October, 1891. *Secondly*, For the remaining 31,490 20/100 acres, undivided forty per cent thereof, to wit, 12,596 08/100 acres, undivided, to said Stokes (the plaintiff) for his past services in undertaking, opening and developing said land and what he may hereafter do in these respects. *Thirdly*, For the other sixty per cent of said 31,490 20/100 acres undivided to wit, 18,894 12/100 acres undivided, the repayment to said Stokes of the sums of money he has lent or may thereafter lend to said Read, and for the performance of said Read's obligations and guarantees to said Stokes. The account against said Read for his said notes outstanding at this date being \$30,042.14, not including interest for which said Stokes now holds as collateral 1,463 shares common stock of Hoffman House, and also the reimbursements to said Stokes for the payments he may make of the amounts due to the said Lloyd W. Williams and to Okey Johnson secured by the deed of trust to said Thomas N. Williams aforesaid;" and, *fourthly*, the residue of the proceeds of the said lands, to wit, of the 18,490 20/100 acres undivided when sold, but not to exceed the rate of eight dollars per acre, to constitute a principal fund to be invested for the benefit of the two children of said Read. The said agreement then contains the following provision: "Now, therefore, the said Stokes covenants and agrees to and with the said Read to pay and apply the consideration as above expressed." The agreement further provided that "said Read, in consideration of the premises, hereby waives and releases all claim and lien on said land, and relies on this agreement as a personal covenant only." This agreement was not recorded and was produced by Read upon the argument of this motion.

Upon this motion the defendant presented his affidavit, in which he deposed that, at the time of the trial of this action, he did not know and had no means of proving the nature of the transaction

between the plaintiff and Read, or that the plaintiff had promised to Read, in consideration of such conveyance, not to enforce said notes, and that the notes should be discharged as aforesaid; that he had no knowledge of the execution of this contract or of its terms until about four weeks before the making of the motion, and while he had learned that Read had conveyed a tract of land in West Virginia to the plaintiff, he was unable to ascertain the nature of the transaction between plaintiff and Read or the disposition which had been made of the said Read notes; that at the time of the transaction and down to some time after the trial of this action the relations between the defendant and the plaintiff and Read were unfriendly and antagonistic, and that neither the plaintiff nor Read would give the defendant any information whatever; that the defendant's first knowledge of the agreement between the plaintiff and Read was acquired at an interview with Read about four weeks before the application was made; that then for the first time the defendant had knowledge of this agreement between the plaintiff and Read, and that he was informed by Read that there was an additional agreement between plaintiff and Read by which the main agreement with Read was to be kept secret in order to hold this defendant upon these said notes, This allegation of the defendant is corroborated by Read's affidavit in which he says that "the said agreement and the nature of the said transaction between the plaintiff and deponent was not disclosed to the defendant, and during the time of the said negotiations with the plaintiff and at the time of the making of the said deed and agreement deponent was not on friendly terms with the defendant, but, on the contrary, their relations had become unfriendly and antagonistic; and at the time of the execution of said conveyance and the making of the said agreement it was understood between the plaintiff and deponent that the making of said agreement and its terms, and the arrangement which had been made for the discharge of the said notes above mentioned, and the entire transaction aforesaid, should not be disclosed to the defendant, and that deponent did not disclose to defendant the making of said agreement or its terms, or the arrangement which had been made as aforesaid for the discharge of the said above-mentioned notes until about four weeks ago, when deponent met defendant accidentally, and that the defendant then spoke to the deponent in regard to his transactions with the plaintiff

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and particularly with reference to the said two notes above mentioned, and deponent then informed defendant for the first time as to the said arrangement for the discharge of said notes and of what the plaintiff had promised deponent in consideration of the conveyance of said land. That in case a retrial of this action is had, deponent is willing to testify to all the facts herein stated." It further appeared that those notes made by Read were never presented to him for payment and that no steps were taken against him to collect the notes until 1894, long after the trial of this action, although one of the notes became due in November, 1891, and the other in June, 1892.

An affidavit of Read's is also presented in which he swears that at the time the demands for the amount of these notes were made upon him it was stated to him that such demand was for the purpose of reaching the defendant and for use by the plaintiff in connection with possible proceedings against the defendant and should not in any way affect deponent's rights under the agreement with the plaintiff set forth in Read's prior affidavit. The plaintiff admits the conveyance of the land from Read to himself and admits the execution of the agreement between himself and Read, but denies the making of the agreement whereby these notes are discharged as part consideration for the conveyance of the property.

The situation presented is that the defendant has been defeated in the prosecution of his counterclaim upon the sole ground that he failed to show affirmatively upon the trial that the plaintiff was not entitled to retain these Hoffman House bonds, which were the basis of his counterclaim, as security for these two Read notes of which the defendant was the indorser. He now presents evidence tending to show that long before the trial of the action or the tender made to the plaintiff of the amount due upon the notes in suit, the Read notes, of which he was guarantor, had been discharged as the consideration for the conveyance of the land in West Virginia; that the knowledge of such discharge was kept from him in pursuance of an agreement between the plaintiff and Read so as to enable the plaintiff to use these notes against him, although in fact they had been discharged as between the plaintiff and Read; and that, until shortly before the making of the motion, this scheme of the plaintiff and Read had been successful and the defendant had been kept

from any knowledge of the discharge of the notes which, if proved, would have enabled him to succeed in his counterclaim.

The plaintiff has tried to show that the defendant had knowledge of this conveyance of land and of the agreement between Read and the plaintiff. A careful consideration of all the facts presented by the plaintiff satisfies us, however, that the defendant did not have knowledge of the terms of this agreement. It is most suggestive in this aspect of the case to notice the reply of the plaintiff to this claim of the defendant which was the basis of his counterclaim. That reply refrains from alleging that the plaintiff was entitled, independent of the August agreement, to retain the Hoffman House bonds as security for the payment of the Read notes. He justifies refusal of the tender solely upon the ground that he was entitled to retain them under the August agreement. In the equity action between the plaintiff and the defendant, however, it had been adjudged that the plaintiff was not entitled to enforce the August agreement as against the defendant; and it is, therefore, difficult to understand why, if the Read notes were then existing obligations of Read, or if the liability of the defendant upon them was then an existing liability, the plaintiff refrained from alleging that, even if the August agreement could not be enforced against the defendant, he was still entitled to hold these Hoffman House bonds as security for the payment of the Read notes. The failure to attempt to enforce these notes against Read or to realize upon the securities which the plaintiff held as collateral is also suggestive. The plaintiff's acts thus tend to corroborate Read's statement that, at the time of the conveyance of this land, there was a complete understanding that these notes of his were thereby discharged. An examination of the conveyance itself, read in the light of the cotemporaneous written agreement executed between the plaintiff and Read, also corroborates Read's claim that as part consideration for this conveyance these notes were to be discharged. The conveyance in terms is in consideration of \$7,000 and other good and valuable consideration. By the cotemporaneous written agreement the parties stipulated as to what that "other good and valuable consideration" was. The consideration for 2,000 acres of the land conveyed was the \$7,000 in cash that was to be paid to Williams. The consideration for the conveyance

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of another portion of the land conveyed, viz., 12,596 acres, was the money expended and the services that the plaintiff had rendered or was to render in improving the property; and the consideration for the conveyance of the remaining land was in part the "repayment" to the plaintiff of these identical notes. The agreement was not that the plaintiff was to hold this remaining portion of the land as security for the payment of these notes. By this agreement, as well as by the conveyance itself, Read's interest in the land was conveyed absolutely to the plaintiff, and by the express terms of the agreement Read was to have for its enforcement no interest in or lien upon the land. It provided that he should rely entirely upon the personal covenants contained therein for any right that he should have to any portion of the proceeds of the land when sold by the plaintiff; and the plaintiff covenanted and agreed "to pay and apply the consideration"—for the conveyance of the land—"as above expressed," viz., in repayment for the Read notes. Thus, part of the consideration for the conveyance of this land to the plaintiff was the repayment of these notes in the manner specified. That repayment did not, by the agreement, depend upon the realization of any money by the plaintiff as the proceeds of the land when he should sell it. Such repayment was, by the express terms of the agreement, the consideration for the conveyance by Read to the plaintiff, which vested the property in the latter. It seems a little difficult to understand upon what principle these parties could agree that the consideration for a conveyance of land was to be the payment of an obligation of the vendor held by the vendee, and at the same time claim that the obligation which had been repaid by the conveyance was still an existing obligation. The word "payment" itself imports a discharge or satisfaction of the debt or obligation. "Payment" is defined in the Standard Dictionary to be the "act of paying or that which is paid; the discharge of a debt, obligation or duty; satisfaction of a claim; requital; recompense;" and it is defined in Bouvier's Law Dictionary to be the "fulfillment of a promise, or the performance of an agreement; the discharge in money of a sum due." Thus, when the plaintiff agreed that the consideration of the conveyance to him of this land by Read should be the repayment of these notes of Read which the plaintiff held, it was an agree-



ment that the notes themselves should be discharged and that the liability represented by the notes was satisfied. And thus the contemporaneous verbal agreement testified to by Read was a mere restatement of the legal effect of the written one signed by the parties. Were there any doubt, however, as to the true construction of the written agreement in this respect, the parol contemporaneous agreement would clearly be admissible and if found (as Read deposes) as a fact, conclusive. Such a parol agreement, in that view, would not tend to vary the written agreement, but rather to supplement it, and thus show the real and complete agreement of the parties. It may be, as claimed by the plaintiff, that as the burden of proof was upon the defendant to show that these Hoffman House bonds were not held as security for any other demand due from the defendant to the plaintiff, he (the defendant) would not be entitled to a new trial merely upon showing that he had intended to swear that there was no agreement that they should be held as security for any other demand, but had failed to do so when giving his evidence upon the trial. But here the defendant has been defeated in his counterclaim because he failed to prove that the plaintiff did not hold the Hoffman House bonds as security for the repayment of the Read notes. He has now discovered evidence of an agreement between Read, the maker of the notes, and the plaintiff, the holder of them, that the notes at the time of the trial had been paid and were no longer actual existing obligations of Read's for which he could be liable. That such testimony would be most material upon the trial of the issue presented by this counterclaim is apparent. The agreements, if proved, absolutely dispose of the right of the plaintiff to hold the Hoffman House bonds as security for the Read notes. For the plaintiff to insist that the Read notes were existing obligations which would entitle him to hold the securities against the defendant, when in fact he had by a secret agreement with the maker of the notes discharged them and accepted the conveyance of land in payment of them, which secret agreement was kept from the defendant for the express purpose of enabling the plaintiff to enforce an obligation against the defendant which he knew did not exist, would be a fraud upon the defendant which no court would tolerate and which of itself would justify the court upon the facts being brought to its attention in ordering a new trial.

As before stated, we are satisfied from an examination of this record that the defendant had no knowledge at the time of the trial of the terms of this secret agreement, or that any such agreement between the plaintiff and Read existed by which the Read notes were discharged. And it certainly is not even suggested that he had any knowledge of the contemporaneous verbal agreement between the plaintiff and Read by which the conveyance of land was distinctly and in the clearest terms accepted as a discharge of the notes, and by which Read was relieved from all liability thereon, by suit or otherwise.

We are not unmindful of the rules which have been established regulating the granting of motions for a new trial upon the ground of newly-discovered evidence, but we think in this case that the defendant presented to the court below a case which justified the court in granting a new trial. The evidence tended pointedly to show that the Read notes had been discharged. The continued existence of the Read notes and the right of the plaintiff to hold the Hoffman House bonds as security for their repayment are the grounds upon which the Court of Appeals refused the defendant a new trial, and this is the one important question left in the case. The evidence now produced tends, as we have seen, to show that the Read notes were discharged in consequence of a secret agreement between the plaintiff and Read, and Read deposes for the purpose of endeavoring to enforce the notes against him after they had been repaid by the conveyance of this land, and thus discharged as against Read, the principal debtor. This evidence could not have been discovered by the defendant prior to or at the former trial, because of the secret agreement between Read and the plaintiff that the nature of the agreement between them should be concealed from the defendant, and the defendant seems to have proceeded with due diligence after he had knowledge of the existence of such agreement.

We have considered the objections made by the plaintiff to this application, but do not consider any of them substantial. The fact that Read was in court at the time of the trial and might have been called as a witness to prove this agreement, had the defendant had knowledge of it, is not an objection to the granting of a new trial. (*Bonynge v. Waterbury*, 12 Hun, 534.)

We have arrived at the conclusion, therefore, that the court below was justified in making the order that it did, and it follows that the order appealed from should be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and McLAUGHLIN, JJ., concurred.

Order affirmed, with costs.

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CLUM B. HAUK, Appellant, v. THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Respondent, Impleaded with the CENTRAL VERMONT RAILROAD COMPANY.

*Negligence — a person, not a passenger, falling upon the steps of a railway station in consequence of a banana thrown thereon — alleged failure to sufficiently light the steps.*

A person who had visited a railroad station for the purpose of obtaining a meal at the restaurant (not a passenger upon the railroad, nor intending to become one), while leaving the station with his wife at about eight o'clock in the evening by a door through which on the same day he had already passed four or five times, opposite to which in the station there was a large electric light, and over the platform outside of which there were also two large electric lights, stepped upon a banana which had been thrown upon the steps and which, by reason of the shadow caused by their bodies, which filled up the doorway, he was prevented from seeing, and fell and was injured.

It was not claimed that the railroad company was responsible for the presence of this banana on the steps, the sole ground of liability upon its part being its alleged failure sufficiently to light the steps.

*Held*, that the railroad company performed its duty if it provided a safe means of egress from the station, in respect to which there was, in this case, no evidence of negligence on its part.

APPEAL by the plaintiff, Clum B. Hauk, from a judgment of the Supreme Court in favor of the defendant, The New York, New Haven and Hartford Railroad Company, entered in the office of the clerk of the county of New York on the 5th day of March, 1898, upon the dismissal of his complaint by direction of the court after a trial at the New York Trial Term, and also from an order entered in said clerk's office on the 10th day of March, 1898, denying the plaintiff's motion for a new trial made upon the minutes.

*M. E. Harby*, for the appellant.

*Henry W. Taft*, for the respondent.

INGRAHAM, J. :

Assuming that there was an obligation upon the defendants to use reasonable prudence and care to keep the platform and steps of the depot in such a condition that those who are permitted to enter the premises should not be unnecessarily exposed to danger, we think the evidence failed to show that the defendants were negligent in the performance of that obligation. The plaintiff went to the depot of the defendants at New London, Conn., for the purpose of obtaining a meal at the restaurant situated in the depot. He was not a passenger upon the defendants' road, nor did he intend to become a passenger. After obtaining his meal he started to leave the depot at about eight o'clock in the evening, when he slipped upon the steps leading from the depot to the station platform and fell, sustaining the injuries to recover for which this action was brought. There was a large electric light in the depot almost opposite the door from which the plaintiff attempted to leave. There were also two large electric lights over the platform outside of the depot, and the evidence is clear that these steps were sufficiently lighted. The plaintiff and his wife attempted to leave the depot together, and it is claimed that as they both attempted to pass through the door at the same time the shadow caused by their bodies filled up the doorway and prevented the plaintiff from seeing a banana which had been thrown upon the steps, and it was stepping upon this banana that caused him to fall. It is not claimed that the defendants were responsible for the presence of this banana upon the steps. There is no evidence that it had been thrown there by any agent of the defendants, or that it had been there for such a time that the defendants in the exercise of ordinary care should have known that it was there or should have caused it to be removed. The sole ground upon which the defendants are sought to be charged is the failure sufficiently to light these steps so as to enable one to use the means of egress from the depot in safety, and without being unreasonably and unnecessarily exposed to danger. The plaintiff testified that the electric lights both inside and outside of the building were burning; that he did not notice

anything with reference to the doorway; that he saw the depot step, but was walking along and was not looking down at all; that he did not see the part of the doorway which was level with the floor of the depot, but noticed that it was not light, but was dark. The witness had on the same day passed through this door four or five times. It thus appears that this station and its approaches were lighted with electric lights and that nothing prevented the plaintiff from seeing this obstruction upon the step but the shadow cast by the bodies of himself and his wife as they attempted to pass through the door side by side, filling up the doorway and casting a shadow upon the steps. The defendants performed their duty if they provided a safe means of egress from the station, and this they appear to have done. They provided sufficient light to enable one using the steps to see any obstacle that had been there thrown, and but for the fact that the plaintiff and his wife had so placed their bodies as to intercept the light it is clear that they could have seen this banana if they had looked. There was thus no evidence to show that the defendants had been negligent in the performance of any duty which they owed to the plaintiff, and the complaint was properly dismissed. The judgment appealed from is, therefore affirmed, with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

BENJAMIN F. DE KLYN, Respondent, v. JOSEPH H. SIMPSON, SIMPSON'S, Defendants, and ANNIE W. GOULD, Appellant.

*Mechanic's lien — covenant in a lease that the tenant will make certain specified changes does not imply a consent that other and additional changes may be made — authority of the lessor's husband to give such consent — notice of lien in which a claim is made only against the tenant.*

A tenant of premises holding under a lease providing that he shall make certain specified changes therein which shall belong to the party of the first part (the lessor) "from the time they are so made, so that no part of the same shall be removed during or at the expiration of the said term, and no changes shall be made in said premises after such changes and improvements have been made, without the written consent of the party of the first part first had and obtained,"

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and containing a further covenant that the tenant will not assign the lease unless with the written consent of the lessor, entered into an agreement with a corporation without having himself undertaken the repairs, that he would endeavor to procure the consent of the lessor to an assignment of the lease to it, and that upon obtaining such consent he would so assign it. Under such agreement the corporation took possession of the premises, and executed a contract for the making of other and more extensive alterations than those mentioned in the lease.

In an action brought to foreclose a mechanic's lien for a balance due on the contract,

*Held*, that the lease could not be construed as implying a consent to such other and further alterations, within the meaning of section 1 of chapter 342 of the Laws of 1885, and thus authorizing the filing of the lien, there being no evidence that the lessor, although she was frequently on the street and saw the work in progress, ever assented to an assignment of the lease or knew of the agreement between her tenant and the corporation, or that the latter was in possession of the premises or doing work thereon.

*Seemle*, that the fact that the lessor's husband had been allowed to collect rents for her or did, as a fact, collect them, or had employed an attorney to act for her, would not justify a finding that he was authorized to consent to additional alterations or changes in the building or to the making of a contract which would charge her interest in the premises with a liability for a large sum of money.

Where, in a notice of lien, the tenant only is named as the person against whose interest the lien is claimed, the interest of the owner of the property is not affected thereby, as the provision of section 4 of the statute, that the failure to state the name of the true owner, lessee, general assignee or person in possession, shall not impair the validity of the lien, cannot have the effect of binding the interest of a person against whom no claim is made.

APPEAL by the defendant, Annie W. Gould, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 30th day of December, 1897, upon the report of a referee directing the foreclosure of a mechanic's lien.

*John E. Parsons*, for the appellant.

*David Willcox*, for the respondents.

INGRAHAM, J. :

The action was brought to foreclose a mechanic's lien for a balance due on a contract for making certain repairs and alterations in a building in which the appellant had a life estate.

The appellant's interest in this property is sought to be charged upon the claim that she consented to the repairs and alterations

provided for by the contract between the defendant corporation and the plaintiff's assignor; and one of the questions presented is whether the evidence was sufficient to sustain the finding of the referee that the plaintiff's assignor performed the labor or services, or furnished the materials used in the erection, alteration or repair of the house, "with the knowledge and consent" of the appellant.

Section 1 of chapter 342 of the Laws of 1885, the act under which the plaintiff seeks to establish a lien upon the appellant's property, provides that "Any person \* \* \* who shall hereafter perform any labor or service, or furnish any materials which have been used or which are to be used in erecting, altering or repairing any house, \* \* \* with the consent of the owner, as hereinafter defined, or his agent, \* \* \* may, upon filing the notice of lien prescribed in the fourth section of this act, have a lien for the principal and interest of the price and value of such labor and material upon such house, \* \* \* and upon the lot, premises, parcel or farm of land upon which the same may stand."

The plaintiff's assignor performed certain labor and furnished certain materials in altering and repairing a house upon the premises known as No. 54 West Twenty-third street in the city of New York, under a contract between himself and a corporation in possession of the premises. He had no contract with the appellant, and no express consent is proved. The referee found that such labor and material were furnished with the consent of the appellant, and the appellant challenges that finding as not being sustained by the evidence. By a contract dated January 14, 1893, between Simpson's, a corporation, of the first part, and P. J. Brennan, contractor, of the second part, Brennan agreed to erect and finish the building, "so far as the mason, iron and carpenter work of proposed alterations and additions of two new stories to the building No. 54 West 23d street, New York city, is concerned, agreeably to the drawings and specifications made by J. B. Franklin, architect," for the sum of \$27,500, which the said corporation agreed to pay. The referee found that the premises in question were leased by the appellant to one Joseph H. Simpson by a lease dated July 18, 1892. This lease was to begin on the 1st day of May, 1893, and to continue for twelve years. By the said lease the tenant agreed that he would, "at his and their own cost and expense, make changes and improvements on the above-

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named premises," which changes were specifically described in the lease, "the whole work to be done at the cost and expense of the party of the second part, his heirs, executors and administrators, and without any cost or charge to the party of the first part, and to be finished by the first day of May, in the year 1894." In the lease it was further mutually covenanted and agreed that "all the changes and improvements made on said demised premises are to be left on the premises and to accrue to the benefit and to go and belong to the party of the first part, her heirs and assigns, from the time they are so made, so that no part of the same shall be removed during or at the expiration of the said term, and no changes shall be made in said premises after such changes and improvements have been made, without the written consent of the party of the first part first had and obtained." The lease also contained a covenant on behalf of the tenant that he should not assign the lease without the written consent of the party of the first part had and obtained. After this lease was executed the tenant employed an architect to prepare plans. The architect found that the alterations specified in the lease would cost about \$10,000, and recommended that additional alterations should be made. Plans were prepared for such additional alterations, which increased the cost to \$17,500. Subsequently the tenant resolved to increase the height of the building and put in an elevator, so as to increase its rental value. Further plans were prepared and were shown to Mr. Gould, the husband of the appellant. Subsequently a corporation was organized, which, on January 1, 1893, took possession of the premises, under an agreement by which the tenant agreed to use his best endeavors to secure the consent of the landlord to an assignment of the lease to the corporation, and that, when such consent had been obtained, he would assign the said lease to the corporation. It does not appear that this consent was ever asked for or obtained, or that the lease was ever actually assigned to the corporation. Subsequent to the execution of this agreement the corporation made the contract with Brennan, the plaintiff's assignor, to do certain work upon such building, and under this contract Brennan did the work and furnished the materials, making the total cost of the improvement about \$45,000. The corporation paid this amount, except a balance of \$14,308.99, which remained due to Brennan.



The referee found that, while the work upon these premises was in progress, the appellant and her husband were frequently in the street and saw the premises in question and the work going on, and that Mr. Gould was aware of the nature of the work in progress and mentioned the matter to Mrs. Gould; that no statement was ever made to them as to the probable cost of the alterations specified in the lease; that they made no inquiries upon the subject, and made no objection to the manner in which the requirements of the lease were fulfilled; that "the defendant Annie W. Gould consented to the alteration of the building aforesaid, and the labor and materials for which this lien was filed were furnished and performed with the knowledge and consent of said defendant Annie W. Gould, and also of the defendants Joseph H. Simpson and 'Simpson's,'" and that the plaintiff was entitled to judgment against the defendants Annie W. Gould, Joseph H. Simpson and Simpson's, barring and foreclosing them of all interest and equity of redemption in and to the premises, and for a sale of all the right, title and interest which they had in and to the premises at the time of filing said lien.

The question as to what acts of an owner of real estate constitute an implied consent to the furnishing of labor or materials used in the construction of a building upon his property, within the meaning of this statute, has been discussed by the courts of this State in several late cases. A lien of this character was unknown to the common law, and while the statute giving the lien "must receive a liberal construction to secure the beneficial purposes which the Legislature had in view, it cannot be extended to a state of facts not fairly within its general scope and purview. \* \* \* The statutory incumbrance is imposed upon real estate in such cases only when the work is performed or materials furnished in pursuance of some contract with the owner, who is sought to be charged, or whose interest is to be affected, or when his consent is in some way established." (*Spruck v. McRoberts*, 139 N. Y. 197.) In that case it was held that the fact that the owner of the land knew what was being done by the plaintiff, and failed to forbid or prevent him, could not be construed to be a consent within the meaning of this statute. The court said: "In the absence of proof connecting the defendant with the contract, or showing that he consented to the work, neither he nor his title is bound by what was done. When a contractor,

mechanic or material man proposes to erect a building, or to expend labor or material upon land under a contract with a person in possession, it is incumbent upon him to inquire and to assure himself of the fact that the person with whom he contemplates making the contract, or for whose benefit he is about to employ labor or materials, has in fact such an estate or interest in the land as will enable him to assert a statutory lien. If he fails to do this, or is mistaken in his calculations and contracts with a person without title, the statute does not impress a lien upon the estate of the true owner, unless he is in some way connected with the contract, or has given his consent to the expenditure in such a manner as to bind him within recognized principles of equity." In *Hankinson v. Vantine* (152 N. Y. 28) it was held that because a landlord authorized a tenant to make certain specific alterations in the demised premises, without knowledge that the tenant intended to make other alterations than those mentioned, or that he was making others, his property could not be made subject to a lien for all the alterations made, upon the sole ground that he gave the written consent to make certain alterations without including in it a limitation to the effect that he was not allowed to make any alterations in addition to those expressly authorized.

In *Havens v. The West Side Electric Light & Power Co.* (49 N. Y. St. Repr. 771; affirmed by the Court of Appeals, without opinion, in 143 N. Y. 632), which affirmed a judgment of the Special Term for the reasons assigned at Special Term (44 N. Y. St. Repr. 589), it was held that a consent implies not merely that a person accedes to, but that he authorizes, an act; and that where the landlord of premises has leased his land to a tenant, and such tenant enters into a contract to erect a building on the premises, and where the lease contains no permission or provision giving the right to the tenant to erect or construct any building or appliance on the land, the landlord, not being in possession of the premises, could neither consent nor dissent to the erection of such building, the work having been done and the materials furnished, not with, but without, the consent of the owner, the court saying: "The most that can be said is, that Mr. Striker acquiesced, and acquiescence is not consent. We give consent when we yield what we have the right or the power to with-

hold." And at the General Term, Presiding Justice VAN BRUNT, in delivering the opinion of the court, said: "We think that the judgment appealed from should be affirmed, for the reasons assigned by him (the justice at Special Term) in his opinion. It does not seem to us that it could possibly have been the intention of the Legislature to make the owner of land, which he has leased for a long term of years, liable for improvements made upon this land for purposes of trade by his tenant. The mere fact that he may know that the tenant contemplates making certain improvements, or applying the property to certain purposes, certainly cannot make the owner liable for the moneys expended by his tenant in the doing of such work."

These cases seem to establish that a consent cannot be implied upon the sole ground that the landlord gave a consent in a lease to the tenant to make certain alterations, without including in it a limitation to the effect that he was not allowed to make any alterations in addition to those expressly authorized; and that the fact that the owner of the land knew what was being done by the person erecting a building, or making alterations upon a building, upon his land, and failed to forbid and prevent him, could not be construed to be a consent within the meaning of this statute.

By the lease in this case the lessee agreed to make certain alterations and improvements in the premises, which were specified. This work was to be done at the expense of the tenant, and was to be without any cost or charge to the landlord. The tenant further covenanted that after such changes and improvements had been made, no change would be made in the premises without the consent of the appellant (the landlord). It seems to us quite clear that the consent contained in this lease could not be said to be a consent that the work actually done should be performed, or that the materials actually furnished should be furnished. Under it the appellant was careful to limit the tenant as to the alterations that he was allowed to make, and the tenant was required to covenant to make no other changes in the building without the written consent of the appellant. The evidence shows that the improvements contemplated by the parties when the lease was made, and which were consented to by the appellant, would cost about \$10,000, and the utmost that could be said is, that the appellant consented that the

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tenant should make these specified alterations and improvements, which would cost about \$10,000. From the execution of such a lease, therefore, there could not be implied a consent that other and further alterations and improvements upon the building, which would impose a liability upon somebody of upwards of \$45,000, were to be made. The provisions of the lease were, in effect, a consent by the landlord that the tenant should make certain specified improvements, the tenant expressly binding himself to make no other changes or alterations without the written consent of the landlord. There could, under such a covenant, be no implied consent to do what the instrument expressly provided should not be done. But the tenant who, by the lease, covenanted to make those repairs and alterations, and whose personal responsibility to the contractor making them might have been considered as an element in granting the consent, never did attempt to make the alterations, or to become personally liable for them. He entered into an agreement with a corporation that he would endeavor to procure the consent of the appellant to an assignment of the lease to the corporation, and that, upon such consent being so obtained, he would so assign it. Under that agreement the corporation took possession of the premises and made the contract with the plaintiff's assignor, who accepted such contract and performed the work under it. There is no evidence to show that the appellant had any express knowledge of this agreement between her tenant and the corporation or that she ever assented or was asked to assent to an assignment of the lease. The receipts for rent appear to have been all given to the original tenant. The corporation had no permission, express or implied, from the appellant to do any work upon the building. It was under no legal obligation to the appellant and had no contractual or other relation with her. It was from this corporation that the plaintiff's assignor accepted his contract and to it he looked for payment thereunder. The appellant, so far as appears from the record, had no knowledge that the corporation was in possession of the premises or was doing any work or furnishing any materials upon them; nor did she consent that the corporation should either be substituted as the lessee by an assignment of the lease or make the alterations required by the original lease or any other or further alterations upon the building. This corporation took possession of

the demised premises and proceeded, without the consent of the landlord, either written or verbal, to make a contract to change substantially the building and to alter its general character, which involved an expenditure of upwards of \$45,000. To show a consent on the part of the appellant to proceeding under this contract, the plaintiff offered evidence of various conversations between the architect and the tenant and the appellant and her husband, and of conversations between the husband, contractor and the tenant.

The appellant is sought to be held responsible for the communications made to her husband and the knowledge that had been acquired by him. The case is barren, however, of any testimony which would justify a finding that the appellant ever created her husband her agent to consent to these alterations in the building, or that knowledge communicated to him, or statements made by him, bound the appellant. It is not claimed that he had any express authority from the appellant to bind her by any consent to the erection of a building upon the premises. She had executed the lease herself. The covenant in the lease against any additional change or alteration in the building required that her own consent in writing should be obtained ; and the fact that her husband had been allowed to collect rents for her, or did as a fact collect them, or had employed an attorney to act for her, would not justify a finding that he was authorized to consent to additional alterations or changes in the building, or to the making of a contract which would charge her interest in the premises with a liability for such a large sum of money. Her whole conduct shows that she retained control of the property and the power to say what disposition should be made of it. It could hardly be claimed that if the appellant's husband had attempted, as the agent of his wife, to convey or lease the property, the evidence before the referee would justify a finding that he was authorized to make such a conveyance or lease. The evidence does not show that any consent to these improvements was asked of the appellant or of her husband, or that they were consulted before the contract was actually executed, as to whether or not the improvements should be made. Certainly no such information was given to the appellant, nor was her consent asked to the contract as actually made or to the changes and alterations which were eventually determined upon.

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There was an alleged conversation with the appellant testified to by Mr. Franklin, the architect, and several by Simpson, the tenant. The date of none of these interviews is fixed with any certainty. The contract was executed on January 14, 1893. The testimony of the architect is that he met Mrs. Gould some time before the alteration was made; "I cannot remember the date. I don't remember exactly what was said." All that the witness testified to was a recollection that the subject they were speaking about was this building, and the great improvements that were going to be made on the property; the exact words he could not remember. He adds, "I mentioned about the six-story building." He further testified that he did not remember seeing Mrs. Gould at any other time. Simpson, the tenant, testified that he saw Mrs. Gould three or four times after the lease was made; that the first interview he thought was some time in December, 1892, but he could not fix the date. "I simply told her what a nice building we were going to have, and what alterations were going to be made, and something about the cost, and she wished me luck, success, &c." He further testified that at this one interview in December, he thought he figured on the cost, that he thought "\$38,000 — \$45,000 we figured on." The witness was asked the following question: "What did she say to that?" He answered: "A good thing, money back, and no doubt about that — make a lot of money out of it." The witness testified that he next saw Mrs. Gould, "if at any time, once to speak to her while the building was being constructed; saw her twice afterwards while the building was being constructed; on the bridge in front of the door. I could not fix the time." He states that he saw her a third time, in the latter part of August, after the contract was completed, when she congratulated him upon having such a nice place, and that the last time he saw her was when she passed the door while he was in the store, the first year, but that he had no conversation with her at that time. This is all the testimony as to any communication with the appellant about the work, or that anything in addition to that specified in the lease was intended. Neither of these witnesses stated with any particularity the time of the interviews. They expressly say that they are not at all certain about the language that was used.

Mrs. Gould was called as a witness. She swore that when she

first saw the building after the commencement of the improvements, it was completed ; that she had no interviews with Simpson after the lease, until after the building was completed ; that she knew nothing about what the building was going to be, or what improvements Simpson was making in it, until after it was completed ; that the only idea she had about the improvements was formed from the lease ; that she never saw the plans of the building and was never told what the alterations would cost ; that she never knew Mr. Franklin, the architect ; never heard his name before she was called to testify ; never knew Mr. Brennan, the contractor, and never had any communication, correspondence or otherwise, with him, and that she never had the conversation with Franklin that he testified to, and the referee found that no statement was ever made to her as to the probable cost of the alterations specified in the lease.

In this condition of the evidence it seems impossible to sustain the finding of the referee that the work was done and the materials furnished for the completion of this building with the consent of the appellant. The testimony as to the two or three conversations with her is so indefinite as to time and substance that, in the face of her positive denial of such conversations or of any knowledge of the alterations which were to be made in the building, it is not sufficient to prove a consent on her part which would subject her property to an incumbrance. In the lease, as before stated, she with great care restricted the tenant as to the improvements that he should make, and required that her consent in writing be obtained for any additional alterations or changes in the building. Such consent was never asked. All the statements made to her by the two witnesses who testified to conversations with her, were incidental talks upon the premises or upon the street without apparent object and without any request of approval from her as to what was contemplated. It is not shown that she interfered in the slightest with what this corporation and its contractors proposed to do, or that she understood that what they contemplated was anything more than that provided for in the lease to which she had consented. It is not alleged that her attention was called to the fact that these proposed improvements were to be in addition to those called for by the lease, or that she was asked to consent to any modification of the provisions of the lease. Two or three casual conversations in relation

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to the improvements are all that are testified to, and these she positively denies. We think that the testimony falls short of bringing home to her positive knowledge of the contract which was made, or of the contemplated improvements, from which a consent to them can be inferred. Certainly, before a person can be deemed to consent to a contract which will impose upon her property a liability of upwards of \$45,000, there must be a clear statement to her of the terms of the contract or the work which is to be done, so that, with knowledge of the conditions existing at the time, she can have an opportunity of objecting and saving herself or her property from the imposition of such a liability.

As before stated, we do not think the evidence shows that Mr. Gould was authorized by the appellant to consent to the modification of the lease or to the making of this contract; but even if he was, there is no evidence to show that such a consent was given. It is true that he was informed that extensive alterations were contemplated, and of the extent of the addition to the building upon the premises; but it is nowhere alleged that he expressly approved or, assuming to act for his wife, gave any consent to the alterations or to the making of the contract. No such consent was asked of him, nor does it appear that either the plaintiff's assignor, the corporation or the tenant desired such consent or considered that it would be of any advantage to them. The knowledge that he acquired of what was going on was not communicated to him as the agent of his wife or when he was acting for her; and I do not think that such knowledge so acquired can be imputed to the appellant so as to imply from it a consent on her part that this corporation should make a contract to expend \$45,000 upon this building. The evidence that the appellant went to Europe for two or three months, giving her husband a written power of attorney to act for her in her absence, would tend to show that he had not authority to act for her while she was here. On the whole case, we think the evidence fails to show that these materials were furnished or the labor performed upon these buildings with the consent of the appellant.

The appellant also objects to the notice of lien upon the ground that she is not named therein either as owner or lessee, or a person against whom the lien is claimed, or otherwise. The notice of lien states that all of said work was done and materials were furnished



at the request of the Simpson Company; that the name of the owner against whose interest the lien is claimed is the Simpson Company, and that the name of the person by whom the claimant was employed and to whom he furnished such materials is the Simpson Company. The Simpson Company is thus stated to be the employer for whom the labor was done and to whom the materials were furnished, the owner of the property, and the only person against whose interest a lien is claimed. The statute requires (§ 4) that the notice of lien shall contain, among other things, the name of the owner, lessee, general assignee, or person in possession of the premises against whose interest a lien is claimed, but provides that the failure to state the name of the true owner, lessee, general assignee or person in possession, shall not impair the validity of the lien. The appellant insists that, notwithstanding this last provision, the lien under the statute is only enforceable against the interest of the person named; and that while the failure to name the true owner would not affect the validity of the lien as against the interest of the person named in the notice of lien, it cannot have the effect of binding the interest of a person against whom no claim is made; and that this construction of the statute has received the approval of this court in the third department in the case of *Grippin v. Weed* (22 App. Div. 594). It is difficult to see what object there could have been in requiring the insertion of the name of the person against whose interest a lien is claimed, if it was intended by the subsequent provision of the statute to provide that the failure to name such person would have no effect upon the validity of the lien against such person's interest. Full effect can be given to both these provisions of the statute by the construction placed upon the lien in the case of *Grippin v. Weed* (*supra*), that the intent was to hold the interest of the person named in the notice of lien, although the interest of such person in the property was not correctly recited or the name of the real owner was not inserted in the notice. The statute is imperative that the notice of lien shall contain the name of the person against whose interest a lien is claimed, and there is no provision in the statute giving a lien against the interest of one not so named. The 1st section of the act gives a lien only when the notice prescribed in the 4th section of the act is filed; and while a failure to state the true owner would

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not affect the validity of the lien as against the interest of the one named in the notice of lien as the one upon whose interest the lien was desired, we do not think it was the intention of the Legislature to give a lien upon the interest of all those who had any title to the property when, by the notice of lien, the person filing the notice limits the individuals against whom the lien is claimed. This view of the scope of the statute is confirmed by the further provisions of section 4, which provide that the county clerk of each county shall provide and keep a book in his office, to be called the "Lien Docket," which shall be suitably ruled in columns headed "Claimants," "Against whom claimed," "Owners and parties in interest," "Premises," "Amount claimed," in which he shall "enter the particulars of such notice of lien, \* \* \* the names of the owners and persons in interest, and other persons *against* whom the claims are made shall be entered in said book in alphabetical order," thus indicating that the notice of lien is to be given by the alphabetical list of names and not by the description of the premises contained in the docket. We certainly should not extend this statute by holding that such a lien is imposed when, by the notice creating the lien, none is asked for except as against those specifically mentioned, especially when the individual specifically mentioned is the only one who has had any contractual relation with the person seeking to obtain the lien and is the only one liable for the labor performed or materials furnished. In the case of *Spruck v. McRoberts* (45 N. Y. St. Repr. 625) the General Term in the second department held that a lien is valid as against a person not named in the notice of lien as either owner or person against whom the lien is claimed. That case was reversed by the Court of Appeals (139 N. Y. 193), but this point was not discussed by that court and we are not inclined to follow the decision of the General Term. The plaintiff's assignor, in his notice of lien, describes expressly the person against whose interest a lien is claimed. He describes that person as the owner of the property and the person who employed him to furnish the labor and materials. Undoubtedly, his failure to name the true owner, namely, this appellant, would not impair the validity of the lien as against the corporation; but the question is whether, upon filing this notice, he

obtained a lien against the interest of any one except those named in the notice of lien. We think that he did not, as the provision of the statute requiring that he should state the name of the person against whose interest a lien is claimed is imperative, and it is only those persons whose names are stated in the notice of lien whose interests are affected by the lien.

It follows that the judgment appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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THOMAS DWYER, Appellant, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

*Contract for work — insufficiency of proof of the service of notice to the contractor to begin work as the basis of a set-off for delay.*

In an action brought to recover the amount due upon a contract for repairing a sea wall, the defendant set up a claim for liquidated damages for delay in completing the work under a provision of the contract requiring the plaintiff to commence the work "on such day and at such place or places as the commissioner of the department of public parks may designate," and in support of such claim the engineer in the department of parks, who had charge of the work, testified that he sent the contractor (the plaintiff) written notice to commence work on a certain day, a copy of which notice was produced, and further testified: "I don't know what I did with this letter; my usual course is to mail them; I have no recollection whether I mailed it or sent it by special messenger."

*Held*, that such testimony, unaccompanied by other proof, was insufficient to justify a finding by the jury that such notice as the contract required was ever given to the plaintiff.

APPEAL by the plaintiff, Thomas Dwyer, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 23d day of June, 1896, upon the verdict of a jury.

Joseph A. Flannery, for the appellant.

Chase Mellen, for the respondent.

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INGRAHAM, J. :

The action was brought to recover the amount due upon a contract to repair and protect the foundation and masonry of the Battery sea wall adjoining Battery Park in the city of New York, and the defendant sought to offset liquidated damages provided for in the contract between the parties for delay in finishing the work required by the contract. By the contract the plaintiff agreed that he would commence the work "on such day, and at such place or places, as the commissioner of the department of public parks may designate, and progress therewith, so as to complete the same in accordance with this agreement, on or before the expiration of thirty consecutive working days next thereafter;" and the answer alleged that after the making of the contract, and on or about the 12th day of July, 1893, the defendant notified the plaintiff to begin work under said contract; that the plaintiff failed to complete the work in accordance with said agreement on or before the expiration of thirty consecutive working days next after the date upon which he was ordered and directed to commence work as aforesaid; that the total time occupied by the plaintiff in performing and completing the work under said contract was the period of one hundred and three and one-half days; that after a certain allowance was made by the defendant to the plaintiff the plaintiff was in default during a period of eleven and nine-tenths days, and that, in accordance with the terms of said contract, the defendant suffered damage by reason of said default in the sum of \$238. To prove this offset or counterclaim the defendant called the engineer in the department of parks who had charge of the work under this contract. He testified that he notified the contractor to commence work; that he sent the contractor a written notice to commence work on a certain day. A copy of a paper was produced and the witness was asked if that was a copy of the notice that he sent, to which he replied that it was. The witness then testified: "I don't know what I did with this letter; my usual course is to mail them; I have no recollection whether I mailed it or sent it by special messenger." The witness further testified that in cases of contracts of this description he always prepared a similar notice, and ordinarily had it mailed to the address which the contractor had on his proposal when he made the bid; that he did not recollect any further

than he had testified; that he could not tell whether he sent it by special messenger or by mail, "one or the other." There was no other evidence as to the giving of this notice to the plaintiff, and the plaintiff testified that he had no recollection of receiving such a notice. A copy of this letter was admitted in evidence after an objection and exception by the plaintiff, and at the end of the case the plaintiff asked that a verdict be directed. This motion was denied, and the plaintiff excepted. Counsel for the plaintiff, then, at the end of the charge, asked the court to charge the jury that there was no evidence that Mr. Kellogg personally mailed this notice, to which the court replied that the jury would remember what the evidence was.

We think the admission of this notice was error, as there was no evidence from which the jury could properly find that notice was ever given to the plaintiff to commence the work as required by the contract. By the contract the plaintiff was required to commence on such day and at such place or places as the commissioners of the department of parks might designate, and complete the work on or before the expiration of thirty consecutive working days "next thereafter." Before the plaintiff was bound to commence work under the contract, the commissioners were required to designate a day, and the time within which the contract was to be completed was to commence to run "next thereafter." To justify the defendant in retaining any portion of the consideration to be paid for the completion of this contract it was necessary to show that such a day had been designated by the department of parks and notice thereof given to the plaintiff, and the court correctly charged the jury that the burden of proof was upon the defendant to show that such notice was sent and received. This the evidence failed to show. If the notice had been sent by a special messenger it was incumbent upon the defendant to prove by that messenger the service of the notice upon the contractor. If such notice had been sent by mail, it was sufficient to take the case to the jury to show that a notice properly directed, with the postage paid thereon, addressed to the contractor at his residence, or the place designated by him as his residence or place for receiving notices, had been deposited in the post office. The evidence failed to show that any messenger had delivered this notice to the plaintiff, or that any

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- notice properly stamped and addressed had been deposited in the post office. In fact, the only witness called by the defendant expressly testified that he had no recollection as to whether it was sent by a messenger or by mail. There was no evidence that any postage stamps had been placed upon it, or that it was deposited in the United States mail or delivered to any person authorized to post it. In fact, the case was bare of any evidence that would justify the jury in finding that such notice had ever been delivered to or received by the plaintiff. We think, therefore, that the admission of the notice in evidence was error and that there was no evidence to justify a finding of the jury that such notice had been delivered to or received by the plaintiff. For this reason we think the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and McLAUGHLIN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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AUGUST DIETZ, Respondent, v. ANDREW B. YETTER, Appellant.

*Bailment — loss of goods by fire — false representations as to the fireproof character of warehouse buildings.*

Where, in an action brought to recover the value of certain goods which were destroyed by a fire in one of the defendant's warehouses where they were stored, it appears that upon such buildings and upon the vans used in carrying goods to and from them were signs representing the warehouses as fireproof structures, whereas only some of them were, and the one in which the goods were stored was not of that character, a question is presented for the jury whether the representation was such as to lead a person of ordinary care and prudence to conclude that it referred to all of the warehouses, and whether such representation was made by the warehouseman with fraudulent intent to deceive the public in that regard, and whether the plaintiff, relying thereon, stored his goods in the warehouse, in which event he would be entitled to recover.

APPEAL by the defendant, Andrew B. Yetter, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of February, 1898, upon the verdict of a jury, and also from an order entered

in said clerk's office on the 4th day of March, 1898, *nunc pro tunc*, as of the 18th day of February, 1898, denying the defendant's motion for a new trial made upon the minutes, except from so much of said order as directs that it be entered in the place and stead of the order entered herein on February 18, 1898, and so much thereof as vacates and sets aside said last-mentioned order.

*Frederick E. Anderson*, for the appellant.

*Woolsey Carmalt*, for the respondent

INGRAHAM, J. :

The action was brought to recover for the value of certain furniture stored by the plaintiff in the defendant's storehouse and destroyed by fire, the building in which the goods were stored, together with its contents, having been totally destroyed. The plaintiff alleged that in the month of August, 1895, he was desirous of storing in an absolutely safe and fireproof warehouse certain goods, wares and household utensils; that for some time prior to August, 1895, the defendant falsely and fraudulently, by means of his agents and servants and by his printed advertisements, represented to the plaintiff that said warehouse was fireproof, and that goods stored therein would be protected against loss by fire; that the plaintiff, relying on said representations and by reason thereof, believing the same to be true, on or about the 24th day of August, 1895, delivered to the defendant to be stored in his said warehouse the personal property mentioned; that said representations were false and fraudulent, and made for the purpose of deceiving the plaintiff in this, that the said warehouse was not fireproof, and that on the 24th day of September, 1895, the said warehouse, containing the said personal property of the plaintiff was destroyed by fire.

To prove these allegations there was evidence tending to show that the defendant was the owner of three buildings on Sixty-first street, used for the purpose of a storage warehouse. One building, No. 304, was a fireproof structure. Another building, No. 302, adjoining No. 304, was constructed with iron partitions, and though not absolutely fireproof, it had considerable protection against fire, while there was another building on the opposite side of the street, known as No. 305-307 East Sixty-first street, constructed of wood

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and brick and not fireproof. There was also evidence tending to show that there was a sign upon this building No. 305-307 which stated that it was a fireproof building, and that the defendant's vans and trucks used in the carriage of goods to and from his warehouse had upon them a sign, "Globe Storage Warehouse, fireproof, Numbers 302-4, 5-7, 61st street, East." The plaintiff testified that he was familiar with the sign upon the building and upon these vans; that he relied upon the statement of the defendant that the warehouse was fireproof, and that, so relying upon such statement, he stored his goods with the defendant; that in consequence of the falsity of that statement these goods were destroyed by the fire which consumed the warehouse and its contents.

The defendant offered evidence tending to show that the statement was not intended to refer to all of the warehouses, but only to No. 304 East Sixty-first street, which was a fireproof building; that there was no sign upon the building Nos. 305-307 stating that it was fireproof; that when the goods were stored by the plaintiff he was informed that Nos. 305-307 was not a fireproof building, and that storage charges were considerably less in consequence, and that the plaintiff selected that building in which his goods should be stored.

The court left it to the jury to say whether the use of the word "fireproof" on the vans, in connection with the other words which appeared thereon, was such as to lead a person of ordinary care and prudence to conclude that it referred to all of the defendant's warehouses, and whether it was the intention of the defendant in thus framing his advertisement to deceive the public in that regard; also to say whether or not the word "fireproof" was upon the building Nos. 305-307, and whether if such representation was made by the defendant as to the building No. 305, as well as No. 304, it related to the condition of the building, and imported a representation that the building was one which was constructed of non-combustible material; charging the jury that the gist of such an action as this is fraud, and that the representation must have been with fraudulent intent; and that if they found that the evidence was substantially inconsistent with any other theory than that the defendant intended to deceive, then they were entitled to find that the representation itself was a fraudulent representation; and that if they found that



there was such a fraudulent representation by the defendant, and that the plaintiff relied upon such representations, believing them to be true, and that by reason of such reliance he stored his goods with the defendant, the plaintiff would then have made out a case. The court subsequently, at the request of the defendant, charged the jury that they "must find that the representation was made with respect to No. 305 as well as to 304—they must find that the representation was made with respect to 305 in order to justify a verdict for the plaintiff." The jury found for the plaintiff, and, we think, there was evidence to sustain such a finding.

The question was presented to the Court of Appeals in the case of *Hickey v. Morrell* (102 N. Y. 460). It was there held that to represent that a building was fireproof, when it was not, was a fraud which entitles a person, who relies upon such representation, to recover. Judge DANFORTH, in delivering the opinion of the court, says: "To say of a building that it is fireproof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fire-proof buildings." Here, if the plaintiff's testimony is to be believed, there was a direct representation, both upon the building itself, in which the plaintiff's goods were stored, and upon the vans of the defendant, giving the location of the building and representing the warehouse to be fireproof. The defendant concedes that the building Nos. 305-307 was not fireproof, and it was a question for the jury to say whether the representation related to that building. If they did, the representation was clearly false, and if the plaintiff relied upon it the jury were justified in finding a verdict for the plaintiff.

The learned trial judge charged the jury with care, and presented the question to them clearly by a charge which carefully preserved all the rights of the defendant, and we think that the verdict of the jury was justified by the evidence. There is no question as to the admission or rejection of evidence that requires notice. Upon the whole case we think the judgment was right and it is affirmed, with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and McLAUGHLIN, JJ., concurred.

Judgment affirmed, with costs.

JOHN J. CRAWFORD, Appellant, v. LILLIE WINSTON, Respondent,  
Impleaded with Others.

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*Trustee — when an application to the court for instruction is not properly based on facts dehors the instrument.*

A trustee is bound to execute a trust as it is stated in the written agreement creating it; and where its terms are clear and precise, and there is no allegation that there are any conflicting claims made in respect thereto, he is not in a position to apply to the court for its direction as to his administration of the trust because of facts *dehors* the instrument of trust, which have come into existence since its execution.

APPEAL by the plaintiff, John J. Crawford, from an interlocutory judgment of the Supreme Court in favor of the defendant Lillie Winston, entered in the office of the clerk of the county of New York on the 5th day of November, 1897, upon the decision of the court rendered after a trial at the New York Special Term sustaining said defendant's demurrer to the plaintiff's complaint.

*John J. Crawford*, appellant, in person.

*Henry W. Scott*, for the respondent.

INGRAHAM, J. :

The complaint alleges that the defendants Walker Winston and Lillie Winston were married on or about the 16th day of February, 1890, and subsequently executed articles of separation, a copy of which is annexed to the complaint, and under which the plaintiff and the defendant William A. McQuaid became parties as trustees; that subsequently this respondent commenced an action for an absolute divorce from the defendant Walker Winston in the District Court of the Territory of Oklahoma, and that a judgment was entered in said action granting to the said Lillie Winston an absolute divorce from the said Walker Winston; that the defendant Walker Winston has paid to the trustees named in the said instrument the sum of money therein required to be paid, and that there is now in the hands of the plaintiff as one of the trustees the sum of seventy-five dollars; that the defendant Walker Winston has notified the plaintiff not to pay the same over to the respondent; that the plain-

tiff is ignorant of his duties in the premises and cannot ascertain the same without the aid of the court, and, therefore, asks for instructions as to what disposition shall be made of the money in his hands and whether the plaintiff and his co-trustee shall collect from the defendant Walker Winston any further sum under the agreement.

The agreement provides that it shall be lawful for the respondent to live separate and apart from her husband, giving to the respondent the sole custody, control, education and bringing up of the infant child of the parties during her minority; that the defendant Walker Winston shall pay to the trustees the sum of twenty-five dollars per month, in trust for the said wife, to be used for her support and the maintenance and education of the infant until the said infant shall arrive at age or shall have married. It is not alleged that either of the parties to the instrument has requested the enforcement of the obligations therein contained, or that the respondent has made any demand upon the trustees for the sum of money in their hands, or that any difference has arisen between the parties to the agreement as to the rights of either of the parties under it. There is no doubt as to the proper construction of the instrument itself, and the aid of the court is not required to determine the rights or obligations of the parties under it. The trust has not by its terms come to an end, so that a trust fund is in the hands of the trustees for distribution, and no accounting by the trustees is asked for or would be proper under the allegations of the complaint. We cannot see that any question is presented requiring the action of the court, nor does the protection of the plaintiff or his co-trustee require an application to the court. The court is simply requested to advise one of the trustees how to act when there is no allegation of conflicting claims. Nothing is alleged to justify the trustees in submitting the parties to this agreement to the expense and annoyance of a legal proceeding, and we think that the court below correctly refused to entertain the action.

The judgment appealed from is affirmed, with costs.

BARRETT, RUMSEY and McLAUGHLIN, JJ., concurred.

BARRETT, J. (concurring):

I agree with Justice INGRAHAM's conclusion in this case. It will be observed that the trustee does not ask the court to construe the

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trust agreement. Its terms are in fact clear and precise. What he asks is advice and instruction with regard to the legal effect of certain facts *dehors* the instrument, which have come into existence since its execution.

With these later facts the trustee has nothing to do. His duty is confined to the execution of the trust agreement. The only supplemental facts with which he has any concern are those contemplated by the agreement itself, *e. g.*, the majority or marriage of the child or the death prior thereto of either of the parents. If for any other reason or because of any other outside fact, the agreement should be abrogated or modified, the party seeking such abrogation or modification must bring his or her action therefor. This is no concern of the trustee. His sole duty is embodied in the instrument, and he cannot come into court and ask for instructions as to whether he shall or shall not perform that duty strictly as prescribed. The former husband has here notified the trustee in effect to deviate from his duty under the agreement, and the trustee now asks us to instruct him as to whether he shall or shall not so deviate. He clearly is entitled to no instruction on that head. And he needs none in order to avoid responsibility. The only risk he runs is in listening to suggestions at variance with the strict tenor of his prescribed duty.

I concur in the affirmance of the judgment, with costs.

RUMSEY and McLAUGHLIN, JJ., concurred.

VAN BRUNT, P. J. :

I concur in the result. It seems to me, however, that the opinions as written do the very thing which it is held by the judgment herein that the court is not authorized to do, namely, give advice to a trustee as to the execution of his trust in an action founded upon a complaint filed for that purpose.

Judgment affirmed, with costs.

WALKER WINSTON, Appellant and Respondent, v. LILLIE WINSTON,  
Respondent and Appellant.

*Divorce — corroboration of the testimony of detectives — foreign decree granted without service of process upon, or any appearance by, the defendant.*

The testimony of detectives to the effect that they had discovered a husband in a house with a woman who had previously accompanied him there, under such circumstances as clearly to prove illicit relations between them, is sufficiently corroborated within the rule requiring the corroboration of such testimony as a condition precedent to the entry of a decree dissolving the marriage contract, by the statement of a witness who had charge of the apartments in one of which the detectives swore that they found the husband and his companion that, on the occasion in question, the detectives were there and were admitted to such apartments in the manner testified to by one of them, and that the witness afterwards heard "some disturbance," she identifying one of the detectives, although she was not able to identify the others.

VAN BRUNT, P. J., and O'BRIEN, J., dissented.

A decree of divorce granted in a Territory of the United States without service of process within the Territory on the defendant, who was at all times during the pendency of the action a resident of the State of New York, or his appearing in the action, is not binding upon him.

APPEAL by the plaintiff, Walker Winston, from so much of a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 2d day of March, 1898, upon the report of a referee, as adjudgets and decrees that the complaint should be dismissed upon the merits, and also from so much of said judgment as adjudgets and decrees that the court has no jurisdiction to make any judgment disposing of the custody of the infant, Lillian Winston, the child of the parties.

Also an appeal by the defendant, Lillie Winston, from that portion of said judgment which adjudgets and decrees "that the judgment of divorce granted to the defendant against the plaintiff on the 16th day of April, 1896, by the District Court of Noble county, Oklahoma, has no force or validity within the State of New York and did not dissolve the marital relations between the parties within said State."

*John J. Crawford*, for the plaintiff.

*Henry W. Scott*, for the defendant.

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McLAUGHLIN, J. :

This appeal is from a judgment dismissing the complaint in an action for divorce. The allegations of the complaint were denied and the defendant set up in her answer that she had procured a divorce from the plaintiff in the Territory of Oklahoma. She also set up counter charges of adultery against him. Upon the trial it was established that the Oklahoma divorce was obtained without service of process on this plaintiff within that Territory, and also that he did not appear in the action and that he was at all times during the pendency of the action a resident of the State of New York. The decree, therefore, was without jurisdiction as to this plaintiff and by reason thereof not in any way binding upon him. (*Matter of Kimball*, 155 N. Y. 62; *Jones v. Jones*, 108 id. 415; *O'Dea v. O'Dea*, 101 id. 23; *Cross v. Cross*, 108 id. 628; *Bell v. Bell*, 4 App. Div. 527.)

The acts of adultery of the wife charged in the complaint consisted in her cohabitation with a person to whom she was married in the State of New York subsequent to the rendition of the judgment of divorce in Oklahoma. This court has held under similar circumstances that proof of such a relationship as that maintained by the defendant with her so-called second husband is sufficient to sustain a charge of adultery in an action of this character. (*McGown v. McGown*, 19 App. Div. 368.) The defendant, however, claims that she has established the allegations set out in her answer that the plaintiff himself has committed adultery which would entitle her if innocent to a divorce. In other words she claims to have made out a case within the provision of the 4th subdivision of section 1758 of the Code of Civil Procedure. The allegations of her answer in this respect were supported by the testimony of three private detectives. There being no other direct evidence of the plaintiff's guilt than that of these detectives, the plaintiff invokes the rule that a decree dissolving the marriage contract cannot be based upon the uncorroborated testimony of such persons. (*Moller v. Moller*, 115 N. Y. 466; *McCarthy v. McCarthy*, 143 id. 235.) We are, therefore, under the necessity of passing upon and determining whether the testimony of these private detectives is corroborated, and, if so, whether it is sufficiently corroborated to entitle it to credit.

Corroboration does not necessarily consist only of the testimony of witnesses who depose to each and every circumstance or fact testified to by the detectives. As was said in *Mott v. Mott* (3 App. Div. 535), we are to examine the record "to ascertain if there is to be found corroboration by facts or circumstances sufficient to justify the acceptance of what was deposed to" by these witnesses. In this case they testified that upon a certain night, specified by them, they followed the plaintiff and a woman, not the defendant, who went into a house situate on Sixth avenue, in the city of New York; that thereafter they, the detectives, discovered the plaintiff and the woman who had previously accompanied him under such circumstances as to clearly prove illicit relationship between them. It is not necessary to go over the details of the evidence in that respect. These witnesses prove beyond a doubt, if their testimony is to be accepted, the plaintiff's guilt. They are corroborated in material circumstances connected with their account of what took place in the house at the time in question. The corroboration consists of the testimony of the witness who had charge of the apartments, in one of which the detectives swore they found the plaintiff and his companion. This witness testified distinctly that on the occasion in question the detectives were there; that they were admitted to the plaintiff's apartments in the manner testified to by one of them; that the detective then said he wanted to see Mr. Winston; that she showed him the door of Mr. Winston's room; that she rapped upon the door and said "there is a gentleman to see you," and that she afterwards heard "some disturbance." She identified one of the detectives as one of the persons who were present on that occasion, although she did not identify the others. There is corroboration, therefore, of the material facts that the detectives were there; that their errand was to find Mr. Winston; that he was found and called from his room, and that there was a disturbance or noise "like men using angry words." It will also be observed that she heard the detectives or one of them say in the presence of the plaintiff that there was a woman in the room, although she could not testify that he actually heard that statement. The plaintiff did not deny the testimony of the detectives. He did not take the stand to refute it in any respect. If the testimony of these witnesses was false he could have easily and readily contradicted it. Not having done so,

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"slight corroboration" was sufficient. (*McCarthy v. McCarthy supra.*)

The judgment appealed from must be affirmed, with costs.

PATTERSON and INGRAHAM, JJ., concurred; VAN BRUNT, P. J., and O'BRIEN, J., dissented.

VAN BRUNT, P. J. (dissenting):

It is conceded that a finding of adultery should not be based solely upon the evidence of detectives who are employed to obtain the proof of adultery; but that their testimony must necessarily be corroborated before it can be believed. And although it is stated in the case of *McCarthy v. McCarthy* (143 N. Y. 235) that slight corroboration is sufficient if the party accused fails to take the stand in his own behalf, we are not informed in that case as to the gravity of the corroborating evidence. It appears to consist of admissions contained in the letters of the defendant to the co-respondent. It seems to me exceedingly doubtful, in view of the history of legislation as to parties testifying in divorce cases, that the failure of an accused party to take the stand can make evidence credible which would otherwise be incredible and unworthy of belief; for the reason that it is only within a comparatively recent period that the parties to an action for divorce on the ground of adultery could be witnesses even upon their own behalf, except upon the subject of marriage.

In the case at bar there is not a single bit of evidence corroborating any material fact which was sworn to by the detectives, and they are contradicted as to much of the substantial evidence by the so-called corroborating witness. I think it is the first time in the history of proof of guilt upon an issue of adultery that evidence that a detective was seen in a certain place at a certain time is corroborative of the testimony of the detective that on that occasion he saw and heard certain things which nobody else saw or heard, and which there is positive evidence did not occur; because the corroborating witness states that what the detectives testified they heard in regard to the woman crying out, she did not hear; and she certainly was in a position to hear if any such thing occurred. The evidence of the detectives that the alleged woman made the outcry testified to is itself highly improbable, for it does not appear to me, as it did to the detective, that a woman caught in such a position as



the one in question was alleged to have been, would call in the neighborhood for the purpose of witnessing her shame.

It is even claimed in the prevailing opinion that the corroborating witness testified that there was a woman in the plaintiff's room. The only thing she testified to in corroboration was that she saw the detectives there. Now it seems to me that, if there is to be corroboration, it must be corroboration of some facts which are inconsistent with the plaintiff's innocence and not facts which are entirely consistent therewith. Corroborating the detectives as to the fact that they were there upon the night in question proves nothing; and to hold otherwise would be to sweep away the protection which parties have always heretofore received under the law against paid evidence. Detectives are employed to get evidence, and they always get it, many times, however, without any facts whatever to sustain it, which is the reason of the suspicion necessarily attaching to that class of testimony. It is a curious rule of evidence that proof which in itself is absolutely insufficient to prove a charge, becomes potent because it is not denied. That is the rule applied to the case at bar.

Judgment should be reversed.

O'BRIEN, J., concurred.

Judgment affirmed, with costs to the defendant.

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JAMES W. WHEELOCK, Respondent, v. WILLIAM M. CHAPMAN,  
Attorney and Manager of THE CAPITOL FIRE LLOYDS of New  
York, Appellant.

*Lloyds policy of insurance — an action to enforce it may be brought against the general manager at the time of the loss.*

Under a Lloyds policy of insurance, providing that "no action shall be brought to enforce the provisions of this policy, except against the general manager as attorney in fact," etc., an action may be brought against the person who occupies the position of manager at the time a liability arises, although his predecessor's name may appear on the policy as "attorney and manager," especially when it appears that the manager thus sued had been appointed prior to the time the policy was issued and the loss sustained, and that an old printed form of policy having his predecessor's name thereon was used by the company.

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APPEAL by the defendant, William M. Chapman, attorney and manager of the Capitol Fire Lloyds of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 31st day of March, 1898, upon the decision of the court rendered after a trial before the court without a jury at the New York Trial Term.

*Mortimer M. Menken*, for the appellant.

*Abram Kling*, for the respondent.

McLAUGHLIN, J. :

On the 24th of June, 1895, the plaintiff's assignor applied for insurance on certain property in the Capitol Fire Lloyds and received a policy, which, among other things, provided that "No action shall be brought to enforce the provisions of this policy, except against the general manager as attorney in fact, and representing all of the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought as fixing his individual responsibility hereunder. Judgment entered in such an action shall be satisfied out of the premiums in the hands of the underwriters unexpended; if such premiums shall be insufficient, then out of the deposit made by the several underwriters; if both shall be insufficient, then out of the individual liability of the several underwriters, as hereinbefore expressed and limited; but in no case shall the judgment bind the property of the said general manager." The policy bore the names of ten underwriters, and that of "W. J. Turner Lynch, attorney and manager." Thereafter and during the life of this policy the property covered by it was destroyed by fire; proofs of loss were duly made, and the defendant having refused to pay, the cause of action was duly assigned to this plaintiff, and he instituted this action to recover the amount of the loss sustained.

The plaintiff had a judgment and the defendant has appealed. The real ground urged by him for a reversal of the judgment is that the action should have been dismissed against the defendant upon the ground that the complaint and the evidence failed to make out a cause of action against him; that the person who, under the terms of the policy, is made liable to respond for the loss sustained, is the attorney and manager, whose name appears on the policy, W.

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J. Turner Lynch. But it appeared upon the trial that Lynch, prior to the time this policy was issued, had either resigned or been removed as attorney and manager of the Capitol Fire Lloyds, and that the defendant had been appointed, and was, at the time the policy was issued and the loss was sustained, acting as such attorney and manager. It also appeared that, when the policy was issued, the Capitol Fire Lloyds were, to the knowledge of the defendant, or at least to the knowledge of its Chicago agent, Russell, from whom the policy in suit was obtained, using old printed forms of policies with Lynch's name thereon. Under these circumstances, it ill becomes the defendant to urge that he should be relieved on that ground.

By the terms of the policy it will be observed that any judgment obtained must be satisfied out of the premiums in the hands of the underwriters before the underwriters became personally liable. The defendant, as attorney and manager, held, so far as appears, the unexpended premiums. He was managing the business and collecting the premiums as they became due. It is, therefore, difficult for us to see just what avail it would be to the plaintiff to have a judgment against W. J. Turner Lynch, and the defendant has not attempted to satisfy us upon that point. In *Leiter v. Beecher* (2 App. Div. 577) this court held that a provision in a fire insurance policy, issued by the agent of an association of underwriters, providing that an action on the policy can be brought only against such agent as attorney in fact of the underwriters, is valid, and authorizes an action on the policy against the agent as such attorney. The defendant, at the time the policy was issued and the action brought, was actually the attorney. He received the proofs of loss at the place of business of the company. The policy, by its terms, provides that an action to recover a loss sustained shall be brought against "the general manager as attorney in fact" of the underwriters. This was the defendant and not Lynch. Lynch had either resigned or been removed. He had no connection with the company from the inception of the policy to the time the judgment appealed from was entered.

The action was properly instituted against the defendant. The judgment is right and should be affirmed, with costs to the respondent.

BARRETT and RUMSEY, JJ., concurred.

BARRETT, J. :

The defendant's liability is purely official. It attaches solely to his position. The only individual liability is that of the ten underwriters who signed the policy. They, and they alone, are practically interested in the action. It is expressly provided in the policy that "in no case shall the judgment bind the property of the said general manager." It is further provided that "no action shall be brought to enforce the provisions of this policy except against the general manager as attorney in fact and representing all of the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought as fixing his individual responsibility hereunder." The person who actually is such general manager at the time a liability arises under the policy is clearly the person contemplated by this provision. It is he, and not his predecessor, against whom the action must be brought. He has succeeded to the latter's representative liability under the contract. And this is undoubtedly so notwithstanding the fact that the predecessor may have signed the policy, and may have been named therein as the then existing representative of the underwriters. The underwriters have surely a right to insist upon the action being defended by their acting representative. Indeed, they could justly refuse to abide the result of a suit brought against a person who had ceased to act for them, to whom they could give no direction and over whom they could exercise no control. This nominal liability of the general manager does not depend upon his or any other agent's signature to the policy, but upon the contract of the underwriters, which requires this action to be brought against him as their representative. This contract, under which the business in question is conducted, he adopts when he assumes the position of general manager. Upon its face it defines his duty, namely, that he shall suffer himself to be made defendant in the concrete action which, to save themselves expense and trouble, his principals have made a condition precedent to recovery. He thus assumes the attitude of a defendant in any such representative action as the contract imposes upon the assured.

I concur, therefore, in the affirmance of the judgment.

**Judgment affirmed, with costs.**

In the Matter of the Application of THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK Relative to Acquiring Title to Certain Pieces or Parcels of Land for a Public Park at Twenty-seventh and Twenty-eighth Streets, between Ninth and Tenth Avenues, in the Twentieth Ward of the City of New York, as Located, Laid Out and Established by the Board of Street Opening and Improvement of the City of New York under and in Pursuance of Chapter 320 of the Laws of 1887, as Amended by Chapter 69 of the Laws of 1895.

THE CITY OF NEW YORK, Successor to THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant; DANIEL B. CHILDS and Others, Respondents.

*New York city — condemnation proceedings to acquire land for a public park — they may be discontinued under section 1000 of chapter 378 of 1897, without costs — an affidavit on a motion should be made by the party.*

Condemnation proceedings instituted under chapter 320 of the Laws of 1887, as amended by chapter 69 of the Laws of 1895, by a resolution of the board of street opening and improvement to establish a public park in the city of New York may, while pending before the commissioners and before they have finished taking testimony as to value, be discontinued by a resolution of the board of public improvement under section 1000 of chapter 378 of the Laws of 1897, although the proceedings were instituted before the passage of the latter act, as such section relates merely to the method of procedure, which the Legislature has power to change even though the change affects pending actions or proceedings.

On such discontinuance the court has not power to dismiss the proceeding "with costs as in an action."

An affidavit used as the basis for a motion should be made by the party and not by the attorney unless some sufficient reason be shown why it should be made by the latter.

APPEAL by The City of New York, the successor of The Mayor, Aldermen and Commonalty of the City of New York, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of June, 1898, discontinuing the proceeding and directing the dismissal of the petition herein as to each of the persons named in the said order.

*Theodore Connolly*, for the appellant.

*Joseph A. Flannery*, for the respondents.

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McLAUGHLIN, J. :

On the 22d of May, 1896, proceedings were instituted under the statute (Chap. 320, Laws of 1887, as amended by chap. 69 of the Laws of 1895), by a resolution of the board of street opening and improvement, to establish a public park in the city of New York, and to acquire by condemnation proceedings the land required. In accordance with the resolution condemnation proceedings were thereafter instituted and commissioners of estimate appointed. The commissioners entered upon the discharge of their duties, gave the requisite notice to the owners of the land proposed to be taken, held numerous meetings, and took much testimony, both as to the title and value of the land. While the proceeding was thus pending before the commissioners, and before they had finished taking testimony as to value, a resolution was duly adopted by the board of public improvements revoking, rescinding and annulling the resolution above referred to and abandoning all proceedings taken thereunder. The special counsel for the corporation thereafter appeared before the commissioners, presented a copy of this resolution, and made this statement to them: "I am instructed by the corporation counsel to abandon the proceeding, declare it ended and take no further action," and thereupon the commissioners adjourned subject to the call of the chairman. Some time thereafter one of the attorneys, who had appeared for and represented twenty-one different landowners at the hearings held by the commissioners, obtained an order to show cause why the commissioners should not proceed with the matter committed to them under the order appointing them, or, in the alternative, why the proceeding should not be dismissed, with costs and disbursements, as in an action, to each of said landowners. On the return of the order to show cause the court directed that the proceeding, "as to each of the persons hereinafter named, be and the same hereby is discontinued, and that the petition of the mayor, aldermen and commonalty of the city of New York herein be and the same hereby is dismissed with costs as in an action," together with necessary disbursements and reasonable counsel fee, the amount of such disbursements and counsel fee to be determined by a referee. From the order thus made this appeal is taken.

We have been unable to find, and our attention has not been

called to any statute or authority which justified the court in making the order which it did. The power formerly vested in the board of street opening and improvement is now vested in the board of public improvements. (Laws of 1897, chap. 378, § 426.) The board of public improvements, by the same act (the charter of the Greater New York), has the power to acquire for the use of the public title to land required for parks, streets, etc. (§ 415), and by section 1000 of the same act it is specifically "authorized and empowered to discontinue any and all legal proceedings taken for opening \* \* \* streets or parks, or parts thereof, at any time before title to the lands and premises to be thereby acquired shall have vested in the city of New York if, in its opinion, the public interests requires such discontinuance." At the time the resolution was passed by the board of public improvements abandoning the proceeding, the title to the land had not become vested in the city. The commissioners had not then made a report, but were actually engaged in taking testimony for the purpose of determining the value of the land to be acquired. Therefore, the board of public improvements, acting under the section last referred to, had the power to discontinue the proceeding; and, having exercised that power, it is difficult to see how landowners or the court, acting upon their application, could compel the city to proceed or, in default, pay costs as in an action, including disbursements and counsel fees. But it is contended on the part of the respondent that section 1000 of the act referred to does not apply to this application inasmuch as the proceeding to establish the park was instituted before that section was enacted. In other words, that the power not having been expressly given to the board of street opening and improvement to discontinue by the statute under which the proceeding was originated, the Legislature could not thereafter confer such power upon its successor in respect to proceedings pending; that to do so would in effect deprive one of an existing right. This contention is without force. Section 1000 of the statute, so far as its provisions now under consideration are concerned, relates merely to the method of procedure, and it is well settled that the Legislature has the power to change procedure, even though it affects actions or proceedings pending. (*Lazarus v. M. E. R. Co.*, 145 N. Y. 581.) The proceeding, therefore, at the time the order appealed from was made,

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had been discontinued. It was dead, and it could not thereafter be resurrected or brought back to life by the persons whose land would have been taken if the proceeding had been continued, or by the court acting on their application.

We are also of the opinion that the order must be reversed for another reason. An examination of the record discloses the fact that the order was based solely upon an affidavit made by one of the attorneys who appeared for, and represented before the commissioners of estimate, twenty-one different landowners. There is not a suggestion in this affidavit or any reason given why it is made by the attorney instead of the clients. Indeed, not a fact is stated from which the court can see or even infer that any of the persons represented by the attorney desire the proceeding continued or would sustain any damage by reason of its discontinuance. Upon such an affidavit, we do not think the court was justified in making the order which it did.

The order should be reversed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., and INGRAHAM, J., concurred; PATTERSON and O'BRIEN, JJ., concurred in second ground of opinion.

Order reversed, with ten dollars costs and disbursements.

In the Matter of the Application of J. EDWARD WELD, as Receiver of the Judgment Debtor, Defendant in the Action of LIZZIE I. MURRAY v. WARREN SAGE.

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WARREN SAGE, Appellant; J. EDWARD WELD, as Receiver of the Judgment Debtor, Respondent.

*Judgment debtor — his refusal to pay over to a receiver money on deposit in a bank account in his wife's name, in which he has deposited money of an insurance company — an affidavit on a motion should be made by the party.*

A judgment debtor who has been directed to pay over to a receiver, appointed in proceedings supplementary to execution against him, money deposited in a bank in the name of his wife, from whom he has a power of attorney under which he has managed the account as his own, is not excused from obeying the order in respect to money, which he conceded to have been his own, deposited



in this account, by proof that he was a fire insurance broker, and that the premiums upon insurance effected by him were paid by checks to his order which he had deposited in this bank account, it not appearing that the money directed to be paid to the receiver included any money belonging to the insurance company.

APPEAL by Warren Sage, the judgment debtor, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 20th day of August, 1898, directing said judgment debtor to pay to the receiver appointed herein certain moneys belonging to him and under his control.

*Eugene Van Schaick*, for the appellant.

*Herbert W. Grindal*, for the respondent.

**McLAUGHLIN, J. :**

This is an appeal from an order directing a judgment debtor to pay certain moneys belonging to him and in his control to a receiver appointed in proceedings supplementary to execution. Section 2447 of the Code of Civil Procedure authorizes such an order to be made where it appears from the examination or testimony taken in proceedings supplementary to execution that the judgment debtor has in his possession or under his control money or other personal property belonging to him, his right to which is not substantially disputed.

The examination of this judgment debtor disclosed the fact that, at the time the order requiring him to appear and submit to an examination was served upon him, he had in his possession the sum which he was directed to pay. His possession was not disputed, and there was no real dispute as to his ownership of it. From his own testimony it appeared that he kept a bank account in the name of his wife, but that he was the only person who had drawn any money out of that account for years; that under a power of attorney from her he managed the account as his own and accounted to no one for the money which he used; that on February 26, 1898, he deposited in this account \$2,008.50 of which \$1,980 was given

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to him by his brother, and that three days later, the day the order was served upon him, he had a balance to his credit in this account of \$777.91, and this balance is the money which he was directed to pay to the receiver. It also appeared from his examination that he was a fire insurance broker, and that the premiums upon insurance effected by him were paid by checks to his order which he deposited in this bank account. It is contended that this money did not belong to him, but to the insurance companies; and we are asked to reverse the order appealed from inasmuch as it was not made to appear on the examination that the money directed to be paid did not include some of this insurance money. A complete answer to this suggestion is that it was not made to appear that any money obtained by the judgment debtor in this way was directed to be paid to the receiver. It did appear, however, that between June 18, 1897, and March 1, 1898, the defendant deposited in this account several thousand dollars which are conceded to have been his own. He claims that this money was used by him in paying household expenses, family debts and insurance premiums; that he did not keep the insurance money separate from his own funds, but took checks payable to his own order, deposited these checks in the bank, then used the money for his personal expenses and in turn took his own money to pay the insurance companies. Under such circumstances we do not think it can be seriously claimed that the money standing to his credit when the order was served did not belong to him, and especially in view of the fact that no attempt was made by him or any one else to show that such money or any part of it was in fact insurance money. If such was the fact, the burden of showing it was upon him, he claiming the exemption.

The order appealed from should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., BARRETT and RUMSEY, J. J., concurred; INGRAHAM, J., concurred in result.

BARRETT, J. :

*Prima facie* the moneys in bank were the property of the debtor. He paid those moneys out to certain insurance companies after he

was served with the order, but he nowhere shows that the moneys so paid belonged to these companies. Whether his payments were of mere debts, or the turning over of trust funds, he does not distinctly state. He leaves us to infer the latter from the mere fact of payment, coupled with the additional circumstance that he was in the habit of depositing these premiums as received. On their face, however, the checks were given for money due by the debtor. If they were given in fulfillment of a trust duty, the debtor should have shown it. The burden was on him when he took the risk of checking against this bank balance of proving that it actually belonged to some one other than himself. He failed to meet this burden. His habit of making deposits there of premiums as received was a mere circumstance, just as was the fact of his making other deposits of moneys avowedly his own in the same account, and blending them all. We find too in his testimony that a few days before the date of the order in supplementary proceedings he deposited \$1,980 which was given to him by his brother. He furnishes no account of the expenditure of this sum further than to say that, when served with the order, there was but \$777.91 to the credit of the account. This balance was apparently what was left of the \$1,980 received from his brother. There is certainly no evidence that it belonged to the insurance companies. The only evidence on that head is that the debtor checked against the balance in favor of these insurance companies. That was apparently because he owed them money, not because they owned the \$777.91, or because they had any specific lien thereon. There is thus no genuine conflict upon this record as to the ownership of the balance in bank. On the evidence before us, it belonged to the judgment debtor. He disobeyed the injunction when he used that balance, whether for personal expenses or in payment of debts; and he must make restoration or suffer the consequences of his contempt.

The order should accordingly be affirmed, with costs.

Order affirmed, with ten dollars costs and disbursements.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. WALTER R. BALLARD, Relator, v. FRANK MOSS and Others, Commissioners, Composing the Board of Police of the Police Department of the City of New York, Respondents.

*Police officer — proceedings for his removal — effect of a failure of the record to show that witnesses were sworn — testimony of the officer which establishes the charges made against him.*

*Semble*, that the mere fact that the record of the conviction of a police officer and the stenographer's minutes do not show that certain witnesses examined in the proceedings before the police commissioners for his removal were sworn (there being nothing in the record to show that they were not) is not sufficient to require, on a review of such proceedings under a writ of certiorari, that they be set aside, the legal presumption always being that a public official having jurisdiction to act has acted legally until the contrary appears.

Testimony under oath by the officer himself that he went off his post for a short time on two different occasions, and that when ordered to the station house he said to the roundsman, who there made a complaint against him, "You lie," amounts to a confession of the charges of using disrespectful language to his superior officer, and that he did not properly patrol his post, and that he was absent therefrom.

CERTIORARI issued out of the Supreme Court and attested on the 8th day of October, 1897, directed to Frank Moss and others, commissioners, composing the board of police of the police department of the city of New York, commanding them to certify and return to the office of the clerk of the county of New York all and singular their proceedings in relation to the dismissal of the relator from his position as patrolman in the police force of the police department of the city of New York.

*Hyacinthe Ringrose*, for the relator.

*Terence Farley*, for the respondent.

McLAUGHLIN, J.:

The relator was removed from the police force of the city of New York after a hearing before the commissioners upon a charge of conduct unbecoming an officer, neglect of duty and insubordination. There were four specifications of the charge: (1) That the relator

used disrespectful language to his superior officer at the sixth precinct station house at a time named; (2) that the relator did not properly patrol his post, and could not be found thereon for a certain interval of time on the morning of the 15th of July, 1897; (3) that he refused to patrol his post at one o'clock in the morning of that day, and (4) that he was also absent from his post at another time on that day.

On the return of a writ of certiorari to review the action of the police commissioners in removing the relator, he contends that his conviction of the charge and his subsequent removal were unauthorized and contrary to law, for the reason that it does not appear from the return that the witnesses against him on the hearing were sworn. It is true that the return does not show that an oath was administered to all the witnesses. The commissioners have made a return that "an examination of the stenographer's minutes taken upon the hearing fails to disclose whether or not" certain witnesses named were sworn. But there is nothing in the record to show that they were not sworn, and this statement of what the stenographer's minutes fails to disclose falls far short of establishing that fact. In *People ex rel. Kasschau v. Police Commissioners* (155 N. Y. 40) the Court of Appeals held that, in proceedings of this character, the witnesses against the accused must be sworn; the general principle being stated that "when a party is protected in the enjoyment of a public office or employment from removal, except for cause to be ascertained and adjudged upon a hearing of a judicial nature, and it appears that he has been removed without any proof of the necessary facts upon oath, the determination if not absolutely without jurisdiction, is clearly erroneous as matter of law." But it will be observed, upon an examination of the *Kasschau* case, that the Court of Appeals say "in the return to the writ of certiorari the commissioners *state affirmatively* that none of the witnesses called to prove the charge were sworn." In the return before us no such affirmative declaration appears. The most that can be said is that the record fails to disclose whether certain witnesses were sworn or not. The commissioners had jurisdiction to entertain charges against this relator and to put him upon his trial therefor. This they did, and now we are asked to assume irregularities in that trial and to conclude from the fact that the record does not

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contain a statement that the witnesses were sworn, that, therefore, they were not sworn. This we cannot do. The legal presumption always is that a public official having jurisdiction to act, has acted legally until the contrary appears. Thus, in *Stafford v. Williams* (4 Den. 182) it was held on a certiorari to review a justice's judgment, when the defendant did not appear before the justice, that it would be presumed that the justice waited one hour after the time named in the summons before proceeding with the case, unless the contrary expressly appeared. In delivering the opinion in that case the court said "the legal presumption is in favor of the proper discharge of official duty, and we must intend that the proceedings were regular until the contrary plainly appears." To the same effect is *Knight v. Wilson* (55 Hun, 559) where it was claimed that a justice of the peace did not wait one hour after the time specified in the summons for its return as required by section 2893 of the Code of Civil Procedure. The court, speaking through MARTIN, J., said: "There is nothing in the return to show that the justice did not wait the required time, and we cannot think that the respondent was bound to show *affirmatively* that this provision of the statute was complied with, but are of the opinion that the burden of showing error in that respect was upon the appellant, who should have obtained an amended return showing plainly that the justice failed to wait an hour if such was the fact."

But independent of this fact it affirmatively appears that there was testimony under oath before the commissioners on the trial of this relator which established the substance of the charge against him, and that testimony was given by himself under his own oath. He testified that he went off his post for a short time on two different occasions during the evening in question, once when he went to the St. Cloud Hotel and once when he went for a bag of tobacco. He also testified that at the station house, to which he had been ordered, he said to the roundsman who there made a complaint against him "you lie," which is the specification of the use of disrespectful language referred to in the charge. His testimony, in fact, amounts to a confession under oath of the charge against him. In any view there was enough sworn testimony before the commissioners on the relator's own showing to authorize them in the interest of the discipline of the service to dismiss him.

The writ of certiorari should be quashed and the proceedings of the commissioners affirmed, with costs.

PATTERSON, O'BRIEN and INGRAHAM, J.J., concurred; VAN BRUNT, P. J., dissented.

Writ quashed and proceedings affirmed, with costs.

HENRY L. HERBERT and GILBERT I. HERBERT, Respondents, v. JOHN DURYEA, Appellant.

SAMUEL W. CASTNER and HENRY B. CURRAN, Composing the Firm of CASTNER & CURRAN, Respondents, v. JOHN DURYEA, Appellant.

*Corporation — a stockholder's liability because the capital stock has not been paid in — objection that the proof that the stock was not paid for tends to show fraud — issue of stock for services by a promoter — attempted ratification thereof.*

In an action brought against a stockholder of an insolvent corporation organized under the General Manufacturing Act (Chap. 40 of the Laws of 1848, and the acts amendatory thereof), to enforce a debt of the corporation upon the ground that the whole amount of the capital stock fixed and limited by the certificate of incorporation had never been paid in, proof that certain stock was never in fact paid for either in cash or property is competent, notwithstanding the fact that such proof will show that the stock was fraudulently issued, and that there is no allegation in the complaint from which fraud can be assumed or implied.

*Semle*, that it is improper for the directors of a corporation to issue stock in payment for services rendered by one as a promoter and organizer of the corporation prior to its incorporation, as the statute requires that stock shall be paid for in cash or in property.

*Semle*, that a resolution subsequently passed by the board of directors which attempts to ratify the issue of the stock to the promoter, is ineffectual.

APPEAL by John Duryea, the defendant in each of the above-entitled actions, from judgments of the Supreme Court in favor of the plaintiffs in each of said actions, entered in the office of the clerk of the county of New York on the 19th day of January, 1898, upon the verdict of a jury rendered by direction of the court,

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and also from orders entered in said clerk's office on the 10th day of February, 1898, denying said defendant's motion for a new trial made upon the minutes in each of said actions.

*Reuben Leslie Maynard*, for the appellant.

*Jacob Marks*, for the respondents.

McLAUGHLIN, J. :

These actions were brought against a stockholder of an insolvent corporation organized under the General Manufacturing Act (Chap. 40, Laws of 1848, and acts amending the same) to enforce a debt of the corporation, upon the ground that the whole amount of capital stock fixed and limited by the certificate of incorporation had never been paid in, and that no proper certificate, showing such payment, had ever been filed.

Three trials have been had in each action. Upon the first trial the plaintiffs recovered, but, upon appeal, the judgments were reversed by the late General Term upon the ground that the trial court erred in not dismissing the complaints. (87 Hun, 288, 619.) Upon the second trial the trial court, following the rule declared by the General Term, dismissed the complaints, but these judgments were in turn reversed by the Appellate Division. (16 App. Div. 249.) The judgments of the General Term were based upon a decision rendered by the same court in the case of *Rowell v. Lambert* (66 Hun, 4), which was thereafter reversed by the Court of Appeals. (*Rowell v. Janvrin*, 151 N. Y. 60.) The complaints in the cases before us are almost identical with the complaint in *Rowell v. Janvrin*, and the Appellate Division, in reversing the judgments upon the second appeal, followed the decision in the *Rowell* case. Upon the third trial verdicts were directed in favor of the plaintiffs, and from the judgments entered thereon the defendant has appealed.

The uncontradicted facts established upon the trial entitled the plaintiffs to recover, and the trial court was, therefore, justified in directing a verdict. The defendant, however, insists that the judgment should be reversed, because the trial court erred in permitting the plaintiffs to prove that certain stock issued to one Schenck was never, in fact, paid for either in cash or property, and that such



proof was inadmissible under the complaint. His contention is that, if the stock was thus issued, it was a fraudulent issue of stock, and that inasmuch as there is no allegation in the complaint from which fraud can be assumed or implied, such fact could not be proved upon the trial. The answer to this suggestion is that the action is brought, not to recover on account of a fraudulent issue of stock, but for a failure to comply with the statute in that, to use the words of the complaint, "the whole amount of capital stock fixed and limited by such company has never been paid in and that no proper certificate stating the amount of the capital so fixed has ever been recorded." Any fact which tended to show that the stock issued as full-paid stock was not in fact paid for was admissible. It was, therefore, competent for the plaintiffs to prove that a large block of the stock was issued to Schenck for services rendered prior to the organization of the company, and while proof of such fact might show that the stock was fraudulently issued, that could not deprive the plaintiffs of the benefit of the evidence as tending to show that the stock had never in fact been paid for. Schenck was the president of the corporation from its organization until its failure, and at the very first meeting of the directors, 20,000 shares (one-fifth of the entire capital stock) were issued to him for services rendered as a promoter and organizer of the corporation. He never paid for this stock in any other way. The statute requires that stock shall be paid for either by cash or property. Services rendered in bringing a corporation into existence is neither cash nor property. If it were, then the entire capital stock could be thus disposed of, and the only asset which the corporation would have would be its naked existence. The least that can be said of a transaction of this character is that it is an ineffectual attempt to evade the statute. The resolution passed by the board of directors in 1885, which attempted to ratify the act of the directors in 1881, in issuing the stock to Schenck, does not aid the defendant, because it did not and could not change the character of the original transaction. The transfer of the copyright of the coupon ticket referred to in the resolution of 1885 was not a part of the consideration for the transfer of the stock to Schenck. This copyright was not obtained until December 28, 1882, more than a year after the stock referred to had been issued.

Upon reason and authority alike it must be held that stock issued

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in the manner in which this was to Schenck was never paid for as required by statute, and by reason of such failure stockholders became liable to creditors of the corporation situated as these creditors are.

Other exceptions were taken by the defendant upon the trial, but none of them deserves serious consideration.

The judgment is right and should be affirmed, with costs.

VAN BRUNT, P. J., BARRETT and RUMSEY, JJ., concurred.

Judgments affirmed, with costs.

IRVING NATIONAL BANK, Appellant, v. WILSON BROTHERS WOODENWARE AND TOY COMPANY, Respondent.

SAME v. SAME.

*Failure to record an assignment for creditors, executed Saturday afternoon, until after a creditors' meeting held the following Monday at two P. M.— it does not establish fraud — cash sales made by the assignee before filing his bond — neglect of the assignee to perform his statutory duties.*

The fact that a general assignment for the benefit of creditors, executed Saturday afternoon, when the county clerk's office is closed, is not recorded until after a meeting of the creditors is held at two o'clock on the following Monday, does not establish fraud in the assignment, nor, where it appears that the creditors at the meeting requested the assignee not to record it, and that he only did so because an attachment was obtained by one of them on the ground that the assignment was fraudulent, is the neglect of the assignee to record the assignment even a subject of criticism.

The fact that the assignee has sold small articles of property for cash before he has filed his bond, the sales having been made with the consent of the creditors attending a meeting at which the party subsequently objecting thereto was present, does not afford a just ground of complaint.

*Seemly*, that the neglect of an assignee to record an assignment, or to do any other act required by the statute, simply furnishes a ground for his removal, and does not impair the title to the property assigned or affect the validity of the instrument in any way.

APPEAL by the plaintiff in each of the above-entitled actions, from orders of the Supreme Court, made at the New York Special

Term and entered in the office of the clerk of the county of New York on the 12th day of July, 1898, granting the motion of the defendant in each of the above-entitled actions to vacate attachments obtained by the plaintiff against it.

*Charles E. Rushmore*, for the appellant.

*Albridge C. Smith*, for the respondent.

McLAUGHLIN, J. :

On Saturday afternoon, the 25th day of June, 1898, the defendant, a domestic corporation, made a general assignment for the benefit of creditors. The assignee accepted the trust and took possession of the property assigned by immediately going to the defendant's place of business and taking from its officers the keys of the store occupied by it, and removing from a safe there kept to his own private office the corporate seal, bank books, lease, insurance policies, etc. On the same day, and shortly after the execution and delivery of the assignment, notices were sent by the officers of the defendant to its creditors of a meeting to be held by them at the office of the assignee at two o'clock on the following Monday. The fact that an assignment had been made was not disclosed in the notices. The meeting was attended by a representative of the plaintiff and by other creditors, representing in the aggregate over ninety per cent of the entire indebtedness of the defendant. The assignment at this time had not been recorded, which fact was made known to the creditors attending the meeting by the assignee himself. When this announcement was made a discussion occurred between the creditors as to whether it was for their interest to have the assignment recorded pending an investigation of the affairs of the defendant by a committee to be appointed by them. After thoroughly considering the question a motion was made and unanimously carried, requesting the assignee not to record the assignment pending such investigation, and he did not do so until a few days later. The plaintiff, however, notwithstanding it had through its representative joined with the other creditors in requesting the assignee not to record the assignment, and before he had done so, obtained in the first action an order of attachment on the ground that the defendant had assigned and disposed of its property with intent to defraud its creditors.

The assignee, immediately upon obtaining knowledge of such attachment, recorded the assignment, and the plaintiff then obtained in the second action an order of attachment upon the same grounds as the one obtained in the first. Both attachments were thereafter vacated, and it is from these orders that the plaintiff has appealed. It insists that the Special Term erred in vacating the attachments for the reason that the uncontradicted facts show that the assignment was not executed in good faith; that it was simply an arrangement between the assignor and assignee for the purpose of hindering and delaying creditors, and thus enabling the assignor to settle and compromise with them. The principal ground urged by the plaintiff as tending to show bad faith between the assignor and assignee is the fact that the assignee did not record the assignment prior to the meeting of the creditors above referred to. The delay at most was but a few hours. The assignment was not delivered until Saturday afternoon and, therefore, could not be recorded on that day. The delay was between the opening of the clerk's office upon Monday morning and the time when the meeting was held in the afternoon. This of itself was insufficient to establish a fraudulent purpose. To vitiate an assignment on the ground of fraud, the fraud must be proved; it cannot be presumed. (*Shultz v. Hoagland*, 85 N. Y. 464.) In the usual course of business, delays of this character are not unusual, and we do not think that the assignee's neglect is even a subject of criticism, especially in view of the fact that whatever he did was done openly; that at the first opportunity he made known to the creditors just what he had done, and put them in possession of all the information which he had, both as to the assignment itself and the purpose covered by it.

Neither do we think the fact that the assignee sold small articles of property for cash before he had filed his bond is subject to the criticism made by the plaintiff. These articles were sold with the consent of the creditors attending the meeting, and the plaintiff, being represented at the meeting and taking part in the same, cannot now be heard to complain of the act of the assignee in that respect.

A careful consideration of the record fails to disclose a single fact from which it can fairly be said, or even inferred, that a fraudulent purpose was contemplated by either the assignor or assignee in the

execution and delivery of the assignment, and whatever may have been done by either of the parties after its execution and delivery could not affect the validity of it, because the title to the property assigned passed upon the delivery, and was then lodged in the assignee for the benefit of the creditors. If the assignee thereafter failed to record the instrument, or to do any other act required of him by the statute, that simply furnished a ground for his removal, and did not and could not impair the title to the property assigned or affect the validity of the instrument in any way. (*Warner v. Jaffray*, 96 N. Y. 248.) To hold otherwise would simply permit an assignee to defeat the operation of the trust created by neglecting to perform a duty cast upon him. We are satisfied that the assignment was made in good faith for the purpose of securing a distribution of the assets of the assignor among its creditors, and, therefore, each order appealed from should be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and INGRAHAM, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements in each case.

#### JACOB RUESS, Appellant, v. ABBIE L. EWEN, Respondent.

*Vendor and purchaser — title originating in a tax lease, after the expiration of which the tenant has continued in possession — a title by adverse possession must rest on unassailable proof thereof.*

A title originating in a tax lease for a term of thirty-five years, expiring in 1857 (the tenant under which and his devisees and successors after the expiration of the term of the lease continue in possession of the premises), is not a marketable title which a purchaser, under a contract executed in 1894, will be required to accept, unless it is demonstrated to a reasonable degree of certainty that the parol evidence in support of a title by adverse possession cannot be contradicted.

APPEAL by the plaintiff, Jacob Ruess, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 29th day of March, 1898, upon the report of a referee directing the dismissal of his complaint.

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34	484
44	172

34	484
165	833

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65	894

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*William H. Stockwell*, for the appellant.

*Tullmadge W. Foster*, for the respondent.

McLAUGHLIN, J. :

In 1894 the plaintiff and the defendant entered into a contract for the purchase and sale of certain real estate in the city of New York, and at the time of the execution of the contract the plaintiff paid to apply thereon the sum of \$500, and he thereafter expended \$300 in searching the title. At the time fixed for the final closing of the contract the plaintiff refused to accept a deed or pay the balance of the purchase money upon the ground that the defendant did not have a marketable title, and he then demanded a return of the money theretofore paid and the expenses incurred by him. The defendant refused to comply with such demand, and this action was brought to recover such sums. The issues involved were sent to a referee, who reported in favor of the defendant, and from the judgment entered upon his report the plaintiff has appealed.

Upon the trial it appeared that the defendant's title was derived through mesne conveyances from one Daniel Ewen, who entered into possession of the land in question in 1822 under a tax lease given by the city of New York for the non-payment of taxes; that this lease ran for thirty-five years from the time it was given, and expired on the 18th of April, 1857. It also appeared that after the expiration of the lease Daniel remained in possession and collected the rents until he died in January, 1865; that he left a will in and by which, after making certain specific bequests, he gave the rest, residue and remainder of his property to his four sons, William, Norman, Edward and Austin; that shortly after his death William and Norman conveyed all their right, title and interest to this land to their brothers Edward and Austin; that Edward died in 1876, also leaving a will in and by which he devised all his right, title and interest to Austin; and that in December, 1877, Austin conveyed his interest to one Rickart, and Rickart, on the same day, conveyed the same to the defendant, the wife of Austin, and that this constituted the only record title defendant had.

An effort was made by the plaintiff upon the trial to establish that the actual title to the land at the time the lease was given to Daniel Ewen was in one Adam Brown, and considerable evidence was given

to establish that fact. But the conclusion we have reached rendered it unnecessary to determine whether the plaintiff's effort was successful or not. If the defendant did not have a marketable title then it was immaterial to the plaintiff in whom the title was.

The defendant's claim is, and that was the conclusion which the referee reached, that her title is a marketable one, it having become so by adverse possession. But we are unable to reach that conclusion. We do not think it can be said on the facts here presented, that a man of reasonable care and prudence would be willing to accept the title, the validity and maintenance of which must of necessity depend in no small degree upon the establishment of facts showing a possession hostile to the true owners long enough to become in law a good title. Title by adverse possession, of course, was not obtained while Daniel Ewen was in possession under the lease from the city. It must, therefore, have been obtained, if at all, after the expiration of the right to occupy under that lease, and whether the occupancy from that time to the time the contract with plaintiff was executed was such as the law requires to make a good title, depends upon several facts concerning which the defendant offered no evidence. It has been held that possession under such a lease, however long it has continued, of itself forms no defense to an action by the real owner. (*Bedell v. Shaw*, 59 N. Y. 46; *Hubbell v. Weldon*, Lalor's Sup. 142.) Who the true owners were during this time, or whether they were under a disability so that the statute would not run against them, did not appear. If the true owners were so situated or under such a disability that they could not assert their rights then the occupancy was not adverse to and the Statute of Limitation did not run against them. (*Fleming v. Burnham*, 100 N. Y. 1.) The most that can be said of this title is that its validity depends upon facts to be determined by parol evidence, and courts of equity will not force such a title upon a purchaser against his will unless it has been demonstrated to a reasonable degree of certainty that the parol evidence cannot be contradicted.

The conclusion thus reached is sanctioned by an unbroken line of authorities in this State. Thus, in *Moore v. Williams* (115 N. Y. 586) the court said, "A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by a resort to parol evidence," and in *Irving v. Campbell*

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(121 N. Y. 353), "It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing influences." *McPherson v. Schade* (149 N. Y. 16) is to the same effect, the court there saying, "Where there is a defect in the record title which can be supplied only by resort to parol evidence and the title may depend upon questions of fact, the general rule is that the purchaser will not be required to perform his contract;" and in the recent case of *Blanck v. Sudlier* (153 N. Y. 556) the court further emphasizes the rule previously announced by saying, "And although the title tendered may in fact be good, yet if it is subject to reasonable doubt, depending upon the ascertainment of some material fact extrinsic to the record title, to be found by a jury when the question arises, the purchaser in general will not be required to complete the purchase."

The legal presumption is that the possession of land is in subordination to the rights of the one having the actual title, and for that reason it has frequently been held that it is not sufficient to establish title by adverse possession to show that the possession has been undisturbed for more than twenty years. The proof must go beyond that and show that the possession has been in hostility to the true owner. The acquiescence of the true owner in the hostile claim of title for the requisite time must appear, or facts from which such acquiescence can be inferred. (*Heller v. Cohen*, 154 N. Y. 299.) Such acquiescence does not appear, and no such inference can be drawn from the record in this case.

The judgment should be reversed and a new trial granted before another referee, with costs to the appellant to abide the event.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and INGRAHAM, JJ., concurred.

Judgment reversed, new trial ordered before another referee, with costs to appellant to abide event.



LIZZIE H. ZEREGA, Respondent, v. ERNST WILL, Appellant.

*Action for rent — a former judgment for rent due under the same lease is conclusive as to the defenses of eviction and surrender prior to its rendition — when the tenant assumes the risk of the condition of the demised premises.*

In an action to recover rent, to which the defenses of eviction from and surrender and acceptance of the demised premises are interposed, proof of a judgment recovered in a previous action between the same parties for rent due under the same lease is a conclusive answer to such defenses, as to any matters occurring prior to its rendition.

Where a tenant has had an opportunity to examine the demised premises prior to the time that the lease was made, and the lease contains no express covenant of warranty, the tenant assumes the risk of their condition.

APPEAL by the defendant, Ernst Will, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 28th day of February, 1898, upon the verdict of a jury rendered by direction of the court.

*Joseph I. Green*, for the appellant.

*Thomas H. Barowsky*, for the respondent.

McLAUGHLIN, J. :

The plaintiff, by an instrument in writing for a term and at a monthly rental therein specified, leased to the defendant a portion of a building. The defendant paid the rent for the first month (May, 1890), and went into and continued in possession of the same until near the close of the month, when he vacated. When the rent for the next month (June) became due, the defendant having failed to pay, the plaintiff brought an action in the City Court of New York to recover the same. The defendant appeared in that action, and the defense there interposed was substantially the same, except surrender and acceptance, as the one interposed in this action. The action was tried and the plaintiff had a judgment for the amount claimed. The balance of the rent under the lease having become due and the defendant having failed to pay, this action was brought, and the defendant had a judgment for the amount claimed and the defendant has appealed.

The judgment is assailed principally upon the ground of errors

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alleged to have been committed by the trial court (1) in permitting the plaintiff to put in evidence the judgment roll in the City Court action, and (2) in excluding certain testimony offered by the defendant.

We think the judgment roll was admissible. The action was between the same parties to recover rent claimed to be due under the lease here involved. The defendant there claimed he ought not to pay because he had been evicted, and that is one of the defenses here relied upon. That he was not evicted prior to the time the rent for the month of June became due was settled and determined in the City Court action, and the judgment there rendered conclusively determined and established that fact. (*Gates v. Preston*, 41 N. Y. 113; *Webb v. Buckelew*, 82 id. 559; *Griffin v. Long Island R. R. Co.*, 102 id. 449.) There was no evidence upon the trial of this action that the defendant was evicted after the rent for the month of June became due. Indeed, it affirmatively appeared from the defendant's own testimony that he left the leased premises before the first day of June, and his testimony was not disputed, but was supported by that of several other witnesses. It is apparent, therefore, that the judgment roll was admissible as bearing upon the defense of eviction. It was also admissible as bearing upon the question of whether there had been a surrender and acceptance. The defendant testified that he left the premises "the latter part of May," and his contention is that when he vacated he surrendered the premises to and the same were accepted by the plaintiff. That question was, however, settled and determined in the action in the City Court, and the judgment then rendered is conclusive and binding upon the parties upon that subject. "The rule is well settled," where the second action is upon the same claim or demand as the first, "that a former judgment of a court of competent jurisdiction is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties *might have litigated* and have decided as incident to or essentially connected with the subject-matter of the litigation within the purview of the original action, either as matter of claim or of defense." (*Griffin v. Long Island R. R. Co.*, *supra*; *Cromwell v. County of Sac*, 94 U. S. 351.)

Upon the trial the defendant endeavored to show by his own testimony a surrender and acceptance of the premises. The testimony was excluded upon the objection of the plaintiff and we think properly. Each of the questions to which objection was made related to a time prior to the rendition of the judgment in the City Court action, and each ruling simply went to the extent of excluding evidence of a surrender prior to that time. Had the defendant sought to prove a surrender and acceptance subsequent to the time the plaintiff's right to recover rent for the month of June accrued, the testimony would have been proper and admissible, but this he did not attempt to do, and the reason is obvious. The defendant had testified that he left the premises in May, and, therefore, he was asked if he did not surrender in *May, June or July*.

The court also properly declined to receive evidence as to the condition of the basement. It appeared that the defendant had an opportunity to examine the premises leased prior to the time the lease was made, and the lease contained no express covenant of warranty, in the absence of which the defendant assumed the risk of their condition. (*Franklin v. Brown*, 118 N. Y. 110.)

The defendant failed to establish any defense to the action. There was an entire failure of proof showing, or tending to show, either an eviction or a surrender and acceptance. The trial court, therefore, was right in directing a verdict for the plaintiff.

The judgment appealed from must be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and INGRAHAM, JJ., concurred.

Judgment affirmed, with costs.

JOHN R. AULD, Appellant, v. THE MANHATTAN LIFE INSURANCE  
COMPANY, Respondent.

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*Negligence — accident on a passenger elevator having a door operated by a button in the floor — proof of notice of the dangerous construction of the door and of similar accidents — negligence of the master co-operating with that of a fellow-servant of an injured employee.*

A corporation owning a large office building in the city of New York equipped a passenger elevator therein with a heavy iron door which opened when the elevator man pressed a button in the floor of the car with his foot, and closed with force when the pressure was removed, it being impossible, after the door commenced to close, to stop it by again pressing the button.

In an action against the corporation by an employee thereof to recover damages for personal injuries sustained by him in consequence of being caught by the door, which suddenly closed while he was attempting to enter the elevator,

*Held*, that proof that the superintendent of the building had complained of the door to the defendant's president, and that at least one other person had been caught by the door in substantially the same way that the plaintiff had, was competent, and that if given it presented a question for the jury whether an elevator door so constructed that if the operator was pushed or jostled by the persons riding in the car, or if he inadvertently or carelessly removed his foot from the button, the door was at once freed from his control and was likely to produce injury to a person entering the car, was a safe appliance to be used under the circumstances;

That, assuming that the plaintiff was a fellow-servant of the elevator man, and that the accident resulted from the negligence of the latter in removing his foot from the button, such facts would not be fatal to the plaintiff's recovery, as a master is liable in case his negligence co-operates with that of a co-servant in producing injury to an employee.

APPEAL by the plaintiff, John R. Auld, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of Kings on the 26th day of January, 1898, upon the dismissal of his complaint by direction of the court after a trial at the New York Trial Term.

*Sumner B. Stiles*, for the appellant.

*Charles C. Nadal*, for the respondent.

McLAUGHLIN, J. :

This action was brought to recover damages for personal injuries caused by the defendant's negligence. Upon the trial the plaintiff was nonsuited, and from the judgment entered thereon he has appealed.

In determining whether the learned trial court erred in thus summarily disposing of the case, the plaintiff is entitled to have the testimony considered in the manner most favorable to him, and he is also entitled to the benefit of any inference of fact that can fairly be drawn from it. Turning then to the testimony as it appears in the record before us, it will be found that the defendant at the time in question was the owner and in possession of a large building upwards of sixteen stories in height, situated on one of the principal streets in the business portion of the city of New York; that a portion of the building was occupied by the defendant, but the greater part by tenants—lawyers, brokers, etc.—for business purposes; that the defendant, for the benefit of the tenants and its employees, had placed and was operating in the building a passenger elevator, the door of which was iron and weighed about 200 pounds; that this door worked automatically by a pneumatic pressure of about 25 pounds to the square inch, opening when the operator pressed a button on the floor of the car, and closing when the pressure was removed; that if the operator, either by accident or design, removed his foot from the button, the door quickly closed with force, and after it had started to close it could not be stopped by again pressing the button; that most elevator doors were opened and closed in a different manner—with the hand; that the plaintiff was an employee of the defendant, acting in the capacity of cashier in one of its departments for a given compensation, and that he also had the right to solicit insurance outside the building, for which he was paid a commission upon the insurance obtained; that on the 3d day of September, 1895, he attempted to enter the elevator in question for the purpose of going to his office on the fifteenth floor, when the door suddenly closed, catching and holding him in such a position that before he could extricate himself or the elevator be stopped, one of his legs was fractured in two places. The plaintiff also sought to prove, but upon the objection of the defendant's counsel the evidence was excluded, that prior to the time he was injured, the superintendent of the building had complained of the door to the defendant's president, and that at least one other person had been caught by the door in substantially the same way that the plaintiff was.

We think the evidence referred to, which was excluded, was

admissible, and that the plaintiff's exceptions to the rulings of the trial court in excluding it were well taken. Indeed, it cannot seriously be questioned that it was proper for the plaintiff to show the occurrence of other accidents for the purpose of making it appear that the defendant had been warned of the dangerous character of the elevator provided for the use of the tenants in the building. (*Brady v. Manhattan R. Co.*, 127 N. Y. 46; *Newall v. Bartlett*, 114 id. 399; *Cavanagh v. O'Neill*, 27 App. Div. 48.) Assuming, therefore, that the plaintiff had been permitted to prove these facts, can it be doubted that the case as then presented would have been one for the jury? The general rule is, that where the circumstances are such that men of ordinary prudence and judgment might differ as to the character of the act under the circumstances of the case, or where different inferences might be drawn from the testimony, then the question must be submitted to and determined by the jury. (*Thurber v. Harlem, etc., R. R. Co.*, 60 N. Y. 331; *Hays v. Miller*, 70 id. 112; *Connolly v. Knickerbocker Ice Co.*, 114 id. 104.) The danger of operating an elevator equipped as this one was, in a large building occupied by many business people in a populous city, was obvious. If the operator was pushed or jostled by the persons riding in the car, or if he inadvertently or carelessly removed his foot from the button, the door was at once freed from his control and nothing but injury could result to a person who was then entering the car. The least that can be said is that men of ordinary prudence, judgment and discretion might differ as to whether it was a safe appliance to use under the circumstances. The language of the Court of Appeals, speaking through RUGER, Ch. J., in reversing the judgment in *Stringham v. Stewart* (100 N. Y. 516), where a nonsuit was granted upon the trial, is applicable to the facts here presented. It is there said: "The danger of so constructing an elevator as to require unremitted attention and faultless accuracy on the part of a fallible agency in the application of power thereto in order to avoid serious injury to persons transported on it, is so obvious that it needs neither proof nor argument to establish its existence." The same principle was enunciated in *Tonkins v. N. Y. Ferry Co.* (47 Hun, 562).

The defendant, however, insists that the accident was caused by the negligence of the operator in removing his foot from the button, and that, inasmuch as he was a fellow-servant of the plaintiff,

the nonsuit was properly granted. The conclusion we have reached renders it unnecessary for us to determine at this time whether the plaintiff and the operator were co-servants. The rule is well settled that where the negligence of the master and that of a co-servant co-operate in producing an injury to an employee, the master is nevertheless liable; "that a fellow-servant may, by care and caution, operate a dangerous and defective machine so as not to produce an injury to the others, does not exempt the master from his liability for an omission to perform the duty which the law imposes upon him of exercising reasonable care and prudence in furnishing safe and suitable appliances for the use of his servants. The rule which excuses the master under such circumstances presupposes that he has performed the obligations which the law imposes upon him, and that the injury occurs solely through the negligence of the co-employee." (*Stringham v. Stewart*, *supra*. See, also, *Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368.)

It follows from what has been said that the plaintiff's exceptions to the rulings of the trial court in excluding the evidence referred to and in granting the nonsuit were well taken, and that the judgment must be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., BARRETT, RUMSEY and INGRAHAM, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

THE SAUGERTIES BANK, Respondent, v. JAMES C. MACK and JANE C. MACK, Appellants.

*Fraudulent transfer — evidence establishing the fraud — books of account kept by the transferor — when admissible against both the transferor and transferee.*

Evidence that after a debtor had transferred his business to his mother, the business was carried on by the mother in substantially the same manner that it had been theretofore, the son being put in charge at a salary of twenty-five dollars per week, payable out of the proceeds of the business, under an agreement entered into at or about the time the transfer was made, is very strong evidence of fraud, especially when taken in connection with the fact that the value of the property transferred was largely in excess of the alleged consideration for the transfer, and that the debtor failed to enter upon his books receipts from

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the business amounting to several thousand dollars received by him at or immediately preceding the transfer.

Where the consideration for the transfer was an alleged loan made by the mother to the son, the books of account kept by the son, showing that whatever moneys had been loaned to him by his mother, had, prior to the transfer, been substantially repaid, are admissible in evidence not only against the son but also against the mother.

APPEAL by the defendants, James C. Mack and another, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 22d day of September, 1897, upon the decision of the court rendered after a trial at the New York Special Term setting aside certain instruments on the ground of fraud.

*L. Laflin Kellogg*, for the appellants.

*Edward A. Hibbard*, for the respondent.

McLAUGHLIN, J.:

This is an action by a judgment creditor to set aside certain transfers on the ground that they were made with intent to hinder, delay and defraud creditors. The plaintiff had a judgment for the relief asked, from which the defendants have appealed. We are entirely satisfied with the conclusion reached by the trial court, and we are unable to see how any other conclusion could have been reached upon the facts presented.

The defendants are mother and son, and at the time when the son made the transfers referred to, no actual consideration passed from her to him. The transaction, however, was attempted to be sustained upon the ground that he was indebted to her for money previously loaned, but the facts presented clearly established that he was not indebted to her at that time, and that the transfers were simply an effort to put all his property beyond the reach of creditors.

(1) The account given by the mother of the loan, as well as that given by the son, was unreasonable and unworthy of belief. She testified that she obtained a part of the money from the "Old country" and the balance by her own labor, and when asked in what way she kept an account of the amounts loaned she replied, "I kept account in my head. Q. Then you never put down on any paper the amount? A. No, sir." And the son testified that he kept account of it for some time and then stopped for the reason, as he said, "I knew I could trust my mother."



(2) The books of account kept by the son show that whatever money had been loaned to him by his mother had, prior to the time of the transfers, been substantially repaid. These books were admissible, not only against the son, but also against the mother. This is precisely what the Court of Appeals held in *White v. Benjamin* (150 N. Y. 258). The books also showed other entries equally significant. They showed that at or about the time when some of the money was claimed to have been loaned, the son actually paid to the mother money, and it is incredible that the son would go through the idle ceremony of borrowing money from his mother one day for the sake of repaying it to her the next.

(3) Other facts were made to appear indicating fraud. The business carried on by the son was, after the transfer, carried on by the mother in substantially the same manner that it had been theretofore. The son was put in charge at a salary of twenty-five dollars per week, payable out of the proceeds of the business, under an agreement entered into at or about the time the transfers were made. It might well be questioned whether this agreement was not in and of itself sufficient evidence of fraud to justify the court in granting the relief which it did. (*Brown v. Sherman*, 16 App. Div. 579; *Kain v. Larkin*, 4 id. 209.) It certainly was very strong evidence of it when taken in connection with the fact that the value of the property transferred was largely in excess of the alleged indebtedness, and that the son failed to enter upon the books certain receipts from the business amounting to several thousand dollars, received by him at or immediately preceding the transfers.

The acts and declarations of the defendants, their relation to each other, the manner in which the books of account were kept, the management of the business both before and subsequent to the transfer, and the value of the property transferred, all indicate a scheme or purpose to put substantially all the property of the son beyond the reach of his creditors — and the trial court was amply justified in reaching that conclusion and setting aside the transfers.

The judgment should be affirmed, with costs.

VAN BRUNT, P. J., PATTERSON, O'BRIEN and INGRAHAM, JJ., concurred.

Judgment affirmed, with costs.

HENRY B. DORNEY, Respondent, v. HUGH O'NEILL, Appellant.

*Negligence — an employee assumes the risk of walking through a passageway in which baskets are stored — sudden extinguishing of the lights — it must be shown to be due to some fault of the master.*

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A servant who continues in the master's employ, knowing that baskets on wheels are generally left standing in a passageway in the master's establishment, through which he is obliged to pass in going from his work, thereby assumes the risk incident to their presence in the passageway, and waives any claim for damages in case he is injured in a collision with one of such baskets.

The fact that the collision occurred at a time when the passageway was in darkness, because for some unexplained reason the electric lights with which the passageway was usually lighted had gone out, will not sustain a recovery by the servant in the absence of evidence establishing that the extinguishing of the lights was due to some personal fault, or the equivalent thereof, upon the part of the master.

O'BRIEN, J., dissented.

APPEAL by the defendant, Hugh O'Neill, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 8th day of January, 1898, upon the verdict of a jury for \$3,250, and also from an order entered in said clerk's office on the 7th day of January, 1898, denying the defendant's motion for a new trial made upon the minutes.

*Eugene Lamb Richards, Jr.*, for the appellant.

*Charles Steckler*, for the respondent.

MCLAUGHLIN, J. :

This is an appeal from a judgment entered upon the verdict of a jury awarding to the plaintiff \$3,250 damages for personal injuries and from an order denying a motion for a new trial.

The plaintiff was an employee of the defendant, and at the time of the accident was working in the basement of the defendant's store. In going to and from his place of work it was necessary for him to walk through a hall or passageway many feet in length and from five to six feet in width. This passageway was lighted by nine incandescent electric lamps placed at intervals along its entire length.

These lamps were operated and controlled by three separate switches; those designated in the evidence 1, 2, 3, 4 and 5 by one switch; 6, 7 and 8 by another; while 9, which was located at the end of the passageway, and about ninety feet from where the plaintiff was injured, was operated by still another. At the close of each day's work a signal was given, by the striking of a bell, for defendant's employees to quit work and leave the building, and when this signal was given, lights 1 to 5 were extinguished, and as soon as the employees had left the building the remaining lights were extinguished, except 9, which was kept burning night and day. On the day of the accident the signal to quit work was given, lights 1 to 5 were extinguished, and the plaintiff started to leave the building, but before he had passed entirely through the passageway all the lights went out, and in attempting to proceed through the darkness he ran into a box or basket on wheels, designated in the evidence a "wheeler," stored in the passageway and sustained a very serious injury.

The recovery obtained by him is attempted to be sustained upon the ground that the defendant was negligent, (1) in storing the "wheelers" in the passageway; and (2) in not having the passageway sufficiently lighted.

It appeared upon the trial, and the fact was not contradicted, that it had been the custom of the defendant during all the time that the plaintiff had been in his employ, which was about two years, to store "wheelers" in the passageway, and that the plaintiff knew it. He, himself, testified that the "wheelers" were generally standing in the passageway every night. The risk, therefore, of walking through the passageway by reason of the "wheelers" being there stored, was one which the plaintiff assumed, since it was incident to his employment. The defendant had the right to use the passageway for such purposes as he saw fit in connection with his business, and if the storage of the "wheelers" there was a source of danger to the plaintiff, and the plaintiff knew of it, by continuing in defendant's service having such knowledge, he also assumed the risk. The rule is well settled that the servant assumes, not only the risk incident to his employment, but also all dangers which are obvious and apparent, and if he enters into or continues in the service, having knowledge of the danger involved, he is in law deemed to assume the risk and to waive any claim for damages in case of injury.

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(*Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 524; *Hickey v. Tuaffe*, 105 id. 26; *Crown v. Orr*, 140 id. 450; *Knisley v. Pratt*, 148 id. 372.) The recovery cannot be sustained upon this ground, nor do we think it can be sustained upon the ground that the defendant was negligent in not sufficiently lighting the passageway. It is conceded that the defendant provided, in the first instance, a proper system for lighting the passageway and supplied a sufficient number of lamps for that purpose. These lamps, so far as appears, had never before failed to accomplish the purpose for which they were intended, and the extinguishment of all of them was in direct violation of defendant's orders. Lamps 6, 7 and 8 were not to be extinguished until the employees had left the building, while lamp 9 was to be kept burning day and night. Why were these lamps extinguished on the evening in question? What caused them to go out? Was it by reason of the negligence of the defendant or of a co-servant? Was it due to some defect in the system for which the defendant was liable, or was it due to some agency over which he had no control? A correct answer to these inquiries cannot be obtained from the record before us. Before the plaintiff was entitled to recover, it was necessary for him to establish personal fault on the part of the defendant, or what is equivalent thereto, and until he had done that, the defendant was entitled to the benefit of the presumption that he had performed his duty. (*Cahill v. Hilton*, 106 N. Y. 512.)

The accident was an unfortunate one, and the plaintiff was very seriously injured, but this of itself did not entitle him to recover. Before he could do that, it was necessary to establish facts from which it could be fairly said, under well-recognized rules of law, that his injuries were due to some wrongful act, either of omission or commission, of the defendant.

It follows that the judgment must be reversed and a new trial granted, with costs to the defendant to abide the event.

VAN BRUNT, P. J., PATTERSON and INGRAHAM, JJ., concurred; O'BRIEN, J., dissented.

O'BRIEN, J. (dissenting):

I think there was sufficient evidence to carry the question of defendant's negligence to the jury.

## 500 MATTER OF BOARD OF STREET OPENING.

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The plaintiff was entitled to have the only passage or mode of egress from the building provided for him and the other employees of this large establishment made and kept reasonably safe. That the injuries were caused by the failure to keep the passageway lighted is not in dispute. Having shown, therefore, the master's duty to his employees with respect to the premises, and having presented evidence from which the inference might be drawn that this duty was not observed on the night of the accident, and that he suffered injuries as the result thereof, I think the plaintiff made out a *prima facie* case, and was entitled to go to the jury upon the question of defendant's negligence.

It is not suggested that plaintiff was guilty of contributory negligence, or that the amount of damages awarded was excessive.

I think, therefore, that the verdict should be sustained and the judgment entered thereon affirmed, and dissent from the conclusion reached by the majority of the court.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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In the Matter of the Application of THE BOARD OF STREET OPENING AND IMPROVEMENT OF THE CITY OF NEW YORK for and on Behalf of the Mayor, Aldermen and Commonalty of the City of New York Relative to the Opening of Lexington Avenue, between Ninety-seventh and One Hundred and Second Streets, in the Twelfth Ward of the City of New York.

JAMES A. DEERING, Appellant and Respondent; JOHN SCHREYER, Respondent and Appellant.

*Costs— an order not allowing costs, reversed with costs— items for making and serving a case and for stenographer's minutes, not proper.*

Where no costs are allowed by an order, made at the Special Term, in a street opening proceeding in the city of New York, relative to the compensation of an attorney for a landowner, and, on appeal, the order is reversed, with costs and disbursements to be taxed, the clerk should tax the costs of the appeal only and not tax any costs for the proceeding in the court below.

On such an appeal, which is heard upon copies of papers used in the court below, items for making and serving a case and the disbursements for the stenographer's minutes are not taxable.

CROSS-APPEALS by James A. Deering and John Schreyer from so much of an order of the Supreme Court, made at the New York Special Term, and entered in the office of the clerk of the county of New York on the 8th day of August, 1898, as denies their respective motions for a retaxation of costs.

*Clarence L. Barber*, for the appellant, respondent.

*Alexander Thain*, for the respondent, appellant.

VAN BRUNT, P. J. :

The petitioner acted as attorney for the respondent, appellant, John Schreyer, in proceedings for the extension of Lexington avenue through lands, amongst others, owned by said Schreyer. The petitioner applied to the court for an order that he be paid the amount of compensation agreed upon out of an award made for the property of said Schreyer. A reference was ordered to hear and report. On the coming in of the report an order was made directing the payment to the petitioner of the sum agreed upon out of the fund in court, with costs. Upon appeal to the Appellate Division this order was reversed, with costs and disbursements to be taxed, upon the ground that the court below was without jurisdiction; and an order was entered thereupon, reversing the order of the court below, with costs and disbursements to be taxed, and further ordering that the proceedings be dismissed. The said Schreyer thereupon presented the bill of costs for taxation to the clerk as in an action, claiming the costs of an action in the proceedings in the court below, and also the costs of the appeal. The clerk declined to tax the costs for the proceeding in the court below, and taxed the costs upon the appeal, allowing costs and disbursements as upon a case made. A motion was made upon the part of Schreyer for a retaxation of these costs, and a motion was also made upon the part of the petitioner for a retaxation. These motions were denied, and an order was entered from which both parties appeal.

It seems to be clear that the clerk was right in refusing to tax costs in the proceeding in the court below, because no such costs have been allowed by any adjudication in any court. The order as entered simply dismissed the proceeding. There was no allowance

of costs, and hence there was no authority for the clerk to tax any. Costs upon the appeal were allowed by the order of the Appellate Division and such costs were properly taxed; but the disbursements in respect to a case were clearly improper, because such an appeal is not heard upon a case, but upon copies of the papers used in the court below, which are certified to it by the clerk of that court, unless the parties stipulate as to the correctness of such copies. Therefore, the items for the making and serving a case of more than fifty folios and the disbursements for stenographer's minutes for case were clearly improper, and should not have been allowed.

The papers before us seem to show that the appeal was argued upon the first term that it was upon the calendar of the Appellate Division. Hence, there was no ground for the taxation of term fees.

We think, therefore, that the order appealed from, so far as it denies the motion of Schreyer for a retaxation, should be affirmed; and so far as it denied the motion of the petitioner for retaxation it should be reversed, and the costs should be retaxed in the manner hereinabove indicated, without costs to either party.

BARRETT, RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

Order, in so far as it denies motion of Schreyer for retaxation, affirmed; and in so far as it denies motion of petitioner for retaxation, reversed, and the costs ordered to be retaxed in the manner indicated in the opinion, without costs to either party.

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FREDERICK B. DE BERARD, Appellant, v. FRANCIS P. PRIAL and THE CHRONICLE & OUTFITTER COMPANY, Defendants, Impleaded with CLUCAS PUBLISHING COMPANY and Others, Respondents.

*Dismissal for a failure to prosecute—the judgment determines the right to an injunction pendente lite—action on the undertaking—reference to compute damages thereunder.*

A judgment entered upon a dismissal of an action for a failure to prosecute it, in which action an injunction *pendente lite* has been granted to the plaintiff, determines that the plaintiff was not originally entitled to the injunction.

*It seems*, that on an application by the defendants for a reference to compute the damages sustained by them under the undertaking on which the injunction

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was granted, the plaintiff's affidavit in opposition to the motion, stating the reasons why he submitted to the dismissal of the action, is not competent to limit the effect of the judgment.

APPEAL by the plaintiff, Frederick B. De Berard, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 27th day of May, 1898, appointing a referee to assess the damages sustained by the defendants upon the undertaking on an injunction issued herein.

*Eugene Frayer*, for the appellant.

*John H. Parsons*, for the respondents, Clucas Publishing Company and others.

BARRETT, J. :

The complaint here was dismissed for failure to prosecute. Upon that dismissal final judgment was entered. The defendants thereupon moved for a reference to assess the damages which they claim to have sustained by reason of an injunction granted to the plaintiff at the commencement of the action. The plaintiff insisted below, and insists here, that the judgment does not determine that he was not originally entitled to the injunction, and consequently that there has been no breach of the undertaking given thereupon. In this he is in error. The authorities are all one way upon the question. (*Pacific Mail S. S. Co. v. Toel*, 85 N. Y. 646 ; *The Apollinaris Co. v. Venable*, 136 id. 46 ; *Manufacturers & Traders' Bank v. Dare Co.*, 67 Hun, 49 ; *Manning v. Cassidy*, 80 id. 127.) The following language of Judge ANDREWS in the *Apollinaris* case is directly in point: "It would seem \* \* \* that if the case was dismissed upon the application of the defendants for want of prosecution, the inference should be indulged that no right to an injunction existed when it was issued, and the dismissal should be treated as an adjudication against the right."

The plaintiff says that he permitted his complaint to be dismissed, because, owing to facts occurring after he obtained the injunction, the defendants became authorized to do what the injunction enjoined them from doing. They were enjoined from doing certain acts without a two-thirds affirmative vote of the stockholders of the



company. Subsequently they secured this two-thirds vote, and thereafter consummated the acts. They were entitled, however, to proceed with the action, and, if right in their primary position, to secure a determination adverse to the plaintiff's original claim. Otherwise, though improperly enjoined, they could never obtain redress upon the undertaking. The original issue remained for determination, notwithstanding the consummation, under later and unquestioned authority, of the acts enjoined.

It may be added that the supplemental facts referred to do not appear of record. They are shown only by the plaintiff's affidavit in opposition to the motion for a reference, and they simply amount to a statement of his reasons for submitting to the dismissal; in other words, a statement of what was in his mind when he thus permitted the action to be determined against him. All that appears of record is the final judgment in the action dismissing his complaint, with costs. By that judgment the court must be deemed to have finally decided that the plaintiff was not originally entitled to the injunction, and, accordingly, the defendants were authorized to proceed upon the undertaking.

The order should, therefore, be affirmed, with costs.

VAN BRUNT, P. J., RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

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LOUIS L. ZIMMER, Appellant, v. WILLIAM H. CHEW and JOHN M. EADIE, Defendants; GEORGE HAGEMeyer and Others, Respondents.

*Note — indorsement in blank — evidence as to ownership — its surrender to the holder by his pledgee — intent of a firm indorsement, how shown — effect of a testator's leaving part of his estate in the business of the firm — amendment where an action is improperly brought against executors as such — appeal where a motion to withdraw a juror is denied.*

The indorsement of a note in blank by the payee and its production by the plaintiff in an action thereon are *prima facie* evidence of the latter's ownership of it, and the existence of subsequent indorsements does not affect this presumption, especially where they are canceled.

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The fact that, three days before the note was made, the payee gave to the plaintiff in the action a power of attorney to collect and receive all moneys payable to him, and that the plaintiff received the note for the payee and acknowledged payment of a part of it, does not necessarily rebut the legal presumption of ownership in the plaintiff or establish that he was a mere collecting agent.

The surrender of the note by a pledgee and creditor of the plaintiff implies either that the debt has been paid or that, though not paid, the pledgee intended to relinquish his lien upon the note, and justifies the parties liable upon the note in paying it to the plaintiff.

A written agreement by a corporation to indorse a series of notes to facilitate their discount by certain firms, is competent evidence that a note of such series, subsequently executed, was indorsed by said corporation with the intention of giving the makers, one of the firms specified in the agreement, credit with the payee.

A firm which, on the seventh of August, agreed to become liable as a joint maker on a note given for the purchase of land in which it was to have an interest, will not be presumed, on the ninth of the same month, to have indorsed such note with the intent that it should involve no liability whatever on its part to the seller of the land; and the fact that it was agreed that a certain company should become a second indorser, and that the firm should indemnify it against all loss by reason of its indorsement, the company thus becoming a surety with a right of recourse against the firm, is cogent evidence that the firm was also liable on its indorsement directly to the payee of the note.

In an action upon such a note, one of the makers may testify as to what was said to him by a member of the firm indorsing the note in regard to the giving of the note; and may also testify as to what the member of the firm said in reference to the responsibility of the indorsers, and may state the nature of the transaction under which the note was given to the plaintiff, and the plaintiff may also properly be asked whether he accepted the note on the faith of the indorsements.

A testator, by leaving a portion of his estate in the business of a firm in which he was a member, with directions that his two sons, his previous partners, should continue to conduct the business on behalf of themselves and of his estate, does not put his general estate at the risk of the business so conducted after his decease, and his executors, in their representative capacities, do not become partners or liable for the conduct of the business of the firm.

Where an action is brought against such executors in their representative capacities the court has no power at the trial to convert the action into one against them individually.

The Appellate Division will rarely reverse the action of the trial court in denying a motion to withdraw a juror. It will not do so where counsel was aware of the relief necessary two months before the trial, and failed to make the proper motion at Special Term.

APPEAL by the plaintiff, Louis L. Zimmer, from a judgment of the Supreme Court in favor of the defendants George Hagemeyer

and others, entered in the office of the clerk of the county of New York on the 22d day of March, 1898, upon the dismissal of his complaint as to such defendants by direction of the court after a trial at the New York Trial Term.

The action is upon a promissory note for \$9,400, dated August 9, 1894, payable in six months, made by Chew and Eadie to the order of Hugh Dalzell, Jr. The indorsements are as follows:

“GEO. HAGEMEYER & SONS,  
“FOREIGN HARDWOOD LOG CO.

“By G. B. HANFORD, *Treas.*

“By NATHANIEL HAVEN, *Vice-Pres't.*

“Rec'd. of Geo. Hagemeyer & Sons, Aug. 9th/94, the sum of eleven hundred (\$1,100) dollars on this note — Hugh Dalzell, Jr., per L. L. Zimmer, Atty.

“HUGH DALZELL, JR.

“LOUIS ZIMMER (Cancelled).

“JOHN W. HAAREN (Cancelled).”

The defendants are the makers, Chew and Eadie, and the indorsers, the Foreign Hardwood Log Company and George Hagemeyer & Sons. The latter firm is sued by making as parties defendant George and Caspar Hagemeyer individually, and also George and Caspar Hagemeyer, Mary Hagemeyer and William Killian, as executrix and executors of the estate of George Hagemeyer, Sr., deceased. It is alleged in the complaint that “the defendants George Hagemeyer and Caspar Hagemeyer, together with the estate of George Hagemeyer, deceased, were partners doing business under the firm name of George Hagemeyer & Sons.” In support of this allegation the will of George Hagemeyer was introduced, the 4th clause of which contained the following provisions:

“All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath unto my executors hereinafter appointed and the survivor of them, in trust, nevertheless, for the following uses and purposes, that is to say: That they shall allow the share of the capital stock of the firm of George Hagemeyer & Sons, which shall belong to me at the time of my decease, to remain in the business until my youngest daughter Eva shall attain the age of twenty-one years, upon the following terms and conditions: My

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two sons, George and Caspar, shall continue to conduct the business on behalf of themselves and of my estate. \* \* \* My executors (exclusive of my said two sons) shall not be compelled to devote any more time to the said business than shall be necessary to enable them to understand at all times its condition and the methods of its management, which they shall have the same right to do as if they were copartners in such business. \* \* \* The same (the testator's share of the capital stock) may also be at any time withdrawn by my executors (other than my said two sons), in case the business shall not be conducted in a manner satisfactory to such other executors."

It is also alleged in the complaint that the note was indorsed by the firm of George Hagemeyer & Sons and also by the Foreign Hardwood Log Company, in substance, for the purpose of giving credit to the makers and inducing the payee, Dalzell, to accept it.

At the close of the plaintiff's case a motion to dismiss was made on behalf of all the defendants except Chew and Eadie on the grounds that the plaintiff had failed to prove that he was the owner of the note; that the defendants, the Foreign Hardwood Log Company and George Hagemeyer & Sons, were not indorsers in regular order, and that there was no proof that the note was indorsed by them for the purpose of inducing its acceptance by the payee, Hugh Dalzell, Jr., or that the latter received it in reliance upon their indorsements; and, as to the executors of the estate of George Hagemeyer, that there was no evidence that they were copartners in the firm of George Hagemeyer & Sons. The motion was granted as to all the defendants in whose behalf it was made.

*George W. Wingate*, for the appellant.

*W. C. Beecher*, for the respondents George and Caspar Hagemeyer, and the estate of George Hagemeyer.

*Charles Howard Williams*, for the respondent, the Foreign Hardwood Log Company.

BARRETT, J.:

The three grounds of the motion to dismiss raise the legal questions to be considered:

1. The indorsement of the note in blank by the payee Dalzell and the production of it by the plaintiff constituted *prima facie* evidence of the latter's ownership. (4 Am. & Eng. Ency. of Law [2d ed.], 318, and cases cited.) The mere fact of subsequent indorsements does not affect this result. Presumably the prior holder, the plaintiff, took up the note. That view is strengthened here by the cancellation of the later indorsements.

To rebut this presumption of ownership, the defendants rely mainly upon the plaintiff's cross-examination. From this it appears that, three days before the note was made, Dalzell gave the plaintiff a power of attorney to collect and receive all moneys payable to him, and that the plaintiff received the note for Dalzell, and acknowledged payment of a part of it. But this does not necessarily rebut the legal presumption of ownership. It is entirely compatible with such ownership. The case is quite different from those cited (*Iselin v. Rowlands*, 30 Hun, 488; *Bell v. Tilden*, 16 id. 346), where there was explicit and uncontradicted evidence that the plaintiff was a mere collection agent.

It also appeared by the plaintiff's testimony that the note was delivered by Haaren, the last indorser, to the Irving National Bank for collection, and remained there for some months after the commencement of the action, and that it was delivered to Haaren as security for a debt due him by the plaintiff, or by the plaintiff and the latter's father. Haaren gave it to the plaintiff's counsel some months before the trial.

This surrender of the note by Haaren, the pledgee and creditor, to the plaintiff, the pledgor and debtor, is susceptible of two inferences; one, that the debt had been paid, and the other that, though the debt had not been paid, Haaren intended to relinquish his lien thereon. It was for the defendants to rebut these inferences, since the legal presumption is in favor of the plaintiff's title. Haaren's act, unexplained, points to the conclusion that the legal title to the note was in the plaintiff throughout. Certainly, in any view of Haaren's acts, the parties liable upon the note would have been justified and perfectly safe in paying the plaintiff. His legal title *prima facie*, has not been successfully shaken, and clearly the case on that head should, at the very least, have been submitted to the jury.

2. The ruling of the learned trial judge, that there was no evidence that the defendants indorsed the note with the intention of giving the makers credit with the payee, is somewhat extraordinary in view of the explicit testimony of the treasurer of the Foreign Hardwood Log Company that the note was indorsed by the company "to assist in the purchase" of certain lands in North Carolina, and that this note was given to the payee Dalzell, one of the owners, as part of the purchase price and as a substitute for cash, and in view of the evidence furnished by the note itself that George Hagemeyer & Sons made a payment thereon to Dalzell on the day it was issued. But, however the case stood on the facts actually proved, evidence was offered and erroneously excluded, which would have abundantly established the liability of all the indorsers. The plaintiff sought to introduce in evidence a contract executed two days before the date of the note in suit by the log company, and the firms of Chew & Eadie and George Hagemeyer & Sons. This contract recited that the two firms had a contract for the purchase of a certain tract of land in North Carolina, known as the "Whittier Tract;" that it was necessary to procure the discount of a series of notes in order to raise the money to pay for the same, and that "the endorsement of said Log Company upon said notes \* \* \* is desired by said firms to enable them to more readily procure the same to be discounted as aforesaid." Thereupon the company agrees to indorse each of the notes. It was provided that the proceeds should be used solely as a fund with which to purchase the land, and the company was given a commission upon all sales of timber upon the tract. There were also careful provisions for its indemnification against loss by reason of the indorsements. It would be difficult to imagine more pertinent or cogent evidence upon the question at issue. Here we have the written acknowledgment of one of the parties that it indorsed the notes to facilitate their discount, which is tantamount to saying that it indorsed them to give the makers credit with the payee, for it could have facilitated the discount only by a loan of its credit. As to George Hagemeyer & Sons we find a discrepancy between the contract and what was done in this particular case. The contract provides that this firm shall be the payee and first indorser, while the note in suit was made out to the order of Dalzell, and the firm's indorsement is simi-

lar to that of the company. But the contract was still strong evidence that the firm was directly liable to Dalzell and subsequent holders. It provided that the notes "shall constitute and be the joint and several liabilities of said firms, and of the said copartners constituting said firms." A firm which, on the seventh of August agreed to become liable as a joint maker on a note given for the purchase of land in which it was to have an interest can hardly have intended, on the ninth of the same month, to make an indorsement which involved no liability whatever to the seller of the land. Again, it is provided that the company shall become a "second indorser" and that the firm shall indemnify it against all loss by reason of its indorsements. The fact that ultimately, as between the parties, the liability of the company was but that of a surety, with a right to recourse against one of the principal debtors, Hagemeyer & Sons, is cogent evidence that the latter were also liable on their indorsement directly to the payee. It would be strange, indeed, if the indorsement of the principal carried no liability while the precisely similar indorsement of the surety did. In that case the latter would have to stand the brunt of proceedings on the note and recoup himself in another action, as unnatural an arrangement as can well be conceived.

Other competent evidence was excluded. The defendant Chew was asked what was said by Mr. Hagemeyer to him upon a particular occasion with regard to the giving of the notes. This was objected to, and plaintiff's counsel, in answer to the objection, stated that he proposed "to prove that the statements made by Mr. Hagemeyer to the witness on this occasion were communicated by him to Mr. Zimmer, and that it was on the faith of those statements that the notes were taken with the indorsement of the Hardwood Log Company and Hagemeyer & Sons, taken by Mr. Zimmer as representing Mr. Dalzell and by Mr. Dalzell afterwards personally." The objection was thereupon sustained. It is hard to see on what theory this ruling was made. The attitude of the firm with regard to the notes prior to their delivery was certainly material, and the admissions of one of the members of the firm, who was conducting the transaction, were competent evidence of it, especially when communicated to the payee and his agent. The witness was then asked questions tending to show that Mr. Hagemeyer spoke of the responsibility of

the indorsers and wished the plaintiff to be informed on the subject; but the evidence was excluded. It was plainly competent. He was also asked, "Now, state what the transaction was under which that note was given to Mr. Zimmer; what was done by other people," and "for what purpose or for what reason was that note given to Mr. Zimmer?" These questions were also excluded and erroneously. They would have disclosed the situation of the parties at the time the note was given and thrown light upon the intention of the indorsers. The plaintiff was also asked directly whether he accepted the note on the faith of the indorsements, and other questions were put to him tending to show that he did rely upon their credit. The evidence was all excluded. Though the attitude of the payee alone cannot control (*Montgomery v. Schenck*, 82 Hun, 24), the evidence was competent in connection with all the other facts. In truth, almost every legitimate effort of the plaintiff to prove this branch of his case was thwarted. It was error to dismiss the complaint upon the evidence actually introduced and still plainer error to exclude the evidence offered.

3. As to the executors of the estate of George Hagemeyer we think the judgment should be affirmed. By leaving a portion of the estate in the business under the testator's will, the executors, if partners at all, merely became such individually to the extent of the fund invested. (*Columbus Watch Co. v. Hodenpyl*, 135 N. Y. 430.) The general estate of the deceased partner did not thereby succeed to his place in the firm, or to the liabilities attached thereto. The testator nowhere attempted to put the general assets of his estate at the risk of the business which was to be conducted after his decease. The business was to be so conducted, not by his executors, but by his two sons individually, and the only power conferred upon the executors was to permit the use of the testator's capital (already invested in the business) by his two sons individually as surviving partners. It follows that no cause of action was made out against the executors in their representative capacity, and the judgment must, therefore, be affirmed as to them.

An amendment was, however, asked for at the trial converting the action against the executors into one against them individually. We think it clear that no such relief could there have properly been granted. What was sought was, in substance, to bring new parties



into the case. George and Caspar Hagemeyer were already parties individually, but Mary Hagemeyer and William Killian were not. They had the right in their personal capacity to answer and defend in the ordinary way. A motion to withdraw a juror was also made and denied. The cases must be rare indeed in which this court will review the discretion of the trial court with reference to such a motion. This is certainly not one of them. The relief became necessary only because of a legal misapprehension, and it appears that the plaintiff's counsel was aware of his error more than two months before the trial. He failed to take the proper steps to remedy his mistake, erroneously acting upon the theory that the court upon the trial could turn an action against defendants in a representative capacity into an action against them individually.

As to the legal representatives of George Hagemeyer, the judgment should be affirmed, with costs. As to the other defendants, respondents, the judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

As to the legal representatives of George Hagemeyer, judgment affirmed, with costs. As to the other defendants, respondents, judgment reversed and new trial granted, with costs to appellant to abide event.

34	512
48	139
449	194

In the Matter of the Application of CLARK H. McDONALD, Superintendent of the Harlem River Driveway in the Department of Parks, City of New York, for a Writ of Alternative Mandamus. CLARK H. McDONALD, Appellant; GEORGE C. CLAUSEN and the DEPARTMENT OF PARKS IN THE CITY OF NEW YORK, Respondents.

*Veteran discharged by his office being abolished in bad faith — laches in making application for a mandamus.*

An application for an alternative writ of mandamus against the park commissioner and the department of parks in the city of New York by a discharged Union soldier, whose office of superintendent was abolished for the sole purpose of thus indirectly removing him therefrom, will not be denied because of

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*laches*, where it appears that, although the relator was notified on the 14th day of February, 1898, that the position was abolished, his application for the writ was not initiated until the 22d day of August, 1898, such delay being explained by the fact that he had no reason, until the 1st day of May, 1898, to doubt that the position had been in good faith abolished, after which date inquiry had to be made as to whether the position, once actually abolished, had merely been revived, or whether, in fact, it had never ceased to exist, it being necessary in the former case for the relator to establish his right to an original preference, and in the latter to a restoration to his position.

APPEAL by the relator, Clark H. McDonald, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 21st day of September, 1898, denying his motion for an alternative writ of mandamus directed to President George C. Clausen, park commissioner for the boroughs of Manhattan and Richmond in the city of New York, and the Department of Parks in the City of New York, commanding them to reinstate the relator in the position of superintendent of the Harlem River Driveway.

*George F. Langbein*, for the appellant.

*Theodore Connolly* and *Terence Farley*, for the respondents.

BARRETT, J. :

The respondents concede, as indeed the papers clearly show, that there was a square question of fact as to whether the abolition of the office was a sham, contrived for the purpose of indirectly removing the relator. It is also conceded, as the result of that issue, that an alternative mandamus should have issued but for the alleged *laches* of the relator in making his application. The sole question now presented, therefore, is whether there was such *laches* as justified the Special Term in denying the alternative writ.

The relator, an honorably discharged Union soldier, duly appointed as superintendent of the Harlem River Driveway, and serving as such, was notified on the 14th day of February, 1898, that the position was abolished, and that his services as such superintendent were no longer required. His application for the writ was initiated on the 22d day of August, 1898. The respondents contend that delay in moving for more than six months after the discharge was

inexcusable *laches*. And they cite in support of their contention the cases of *People ex rel. Miller v. Justices* (78 Hun, 334), and *People ex rel. Young v. Collis* (6 App. Div. 467). These cases do not lay down any hard and fast rule upon the subject. They refer to the statutory limitation of four months with respect to writs of certiorari, and suggest, by way of analogy, that judicial discretion in mandamus should not ordinarily be exercised, in cases like the present, in favor of a city employee who fails to present his grievance for a like period. There is no such statutory limitation with respect to the writ of mandamus, and, while an unexplained delay of over four months may in general be deemed *laches* in this class of cases, yet each case must depend upon its own special facts and circumstances. Here the relator gives full and adequate explanation of the cause of his own non-action down to the 1st day of May, 1898. Until the latter date, he had no reason to doubt that the position had been in good faith abolished. He believed, and he was fully justified in believing, that he had no grievance on the subject. Upon the latter date, however, he learned that the respondents had appointed another person to fill the very position which he was previously told had been abolished. The delay in moving thereafter was of but three months and twenty-two days. Even that delay may well have resulted from the need of inquiry as to whether the position — once actually abolished — had merely been revived, or whether in fact it had never ceased to exist. In the former case he would have had to show his right to an original preference, and his mandamus would have been to compel a new preferential employment; in the latter case only would he have had a right to compel restoration to his position. With this question before him for accurate solution, he was still within the four months allowed to bring certiorari. For certainly he should not be charged with the period of natural inaction which preceded the appointment of another person to fill his place. It is well settled that in determining what will constitute an unreasonable delay, justifying the refusal of the writ of mandamus, "regard should be had to circumstances which justify the delay; to the nature of the case and the relief demanded, and to the question whether the rights of the defendant or of other persons have been prejudiced by such delay." (*People ex rel. Gas Light Company v. Common Council*, 78 N. Y. 56, 63. See, also,

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*People ex rel. Millard v. Chapin*, 104 id. 102.) The delay of six months here has been fairly accounted for and explained; and the delay of less than four months was not unreasonable within any rule heretofore laid down by the Court of Appeals or this court.

The order appealed from should, therefore, be reversed, with costs, and the motion for an alternative writ of mandamus granted.

VAN BRUNT, P. J., RUMSEY, PATTERSON and O'BRIEN, JJ., concurred.

Order reversed, with costs, and motion for alternative writ of mandamus granted.

THOMAS C. STEWART, as Administrator, etc., of ANDREW C. STEWART, Deceased, Appellant, v. JOHN W. FERGUSON, Respondent.

*Negligence — a master is liable for an injury to his servant occasioned by a defective scaffold — Labor Law, 1897, chapter 415, § 18 — violation of a statute or municipal ordinance — contributory negligence.*

Prior to the enactment of the Labor Law (Chap. 415 of the Laws of 1897) the rule was well established that a scaffold erected for workmen is not a place in which their work is to be done, within the meaning of the rule requiring the master to furnish a suitable place in which to do his work, but is an appliance or instrumentality by means of which the work is to be done, and that, if the master furnishes proper material for the scaffold, he is not liable to his workman for the negligent act of one of his employees in building it; but since the enactment of section 18 of that law, the scaffold is regarded as a place furnished by the master upon which the servant is to work, and the duty has devolved upon the master not to permit that place to be unsafe, unsuitable or improper. A servant of the master, in building the scaffold, acts as the master himself.

An employee required to use the scaffold is not called upon to inspect it in order to ascertain if it is safe; he has a right to assume that the master has performed his duty in that regard.

The violation of a statute or of a municipal ordinance which causes an injury to any person is *prima facie* evidence of negligence on the part of the law breaker, which affords sufficient reason for charging him with liability for an accident; but such liability on his part exists only where the violation of the law can be said to have been in some way, or to some extent, the cause of the injury; and where an accident occurs through the breaking of a scaffold, by reason of which an employee falls through five floors and is killed, the fact that the master has not complied with section 20 of the Labor Law, requiring that the floors of the

34	515
39	601
34	515
130	520
34	515
344	59
34	515
344	58
352	318
34	515
71	158
84	515
74	1393
84	515
76	39
84	515
77	1365

building shall be filled in to within three tiers of beams, does not constitute negligence which renders him liable for the accident.

*Semble*, that in such case, as the fact that the floors had not been filled in as the law required was perfectly apparent to the employee who was killed, he, by consenting to work upon the scaffold above the place where these openings were, assumed the risk and was guilty of contributory negligence.

APPEAL by the plaintiff, Thomas C. Stewart, as administrator, etc., of Andrew C. Stewart, deceased, from a judgment of the Supreme Court in favor of the defendant, entered in the office of the clerk of the county of New York on the 23d day of June, 1898, upon the dismissal of his complaint by direction of the court after a trial at the New York Trial Term.

*Edward P. Lyon*, for the appellant.

*John Vernou Bouvier, Jr.*, for the respondent.

RUMSEY, J. :

The action was brought to recover damages for alleged negligence of the defendant which caused the death of the plaintiff's intestate. The defendant was a contractor engaged in the construction of a large building at Hunter's Point, upon which the plaintiff's intestate was working as a bricklayer. The building had progressed until the bricklayers were at work upon the wall between the sixth and seventh floors. A scaffold had been built at that point upon which they were standing. While Stewart was engaged in his work there, the scaffold gave way and he fell through five floors and was killed. The complaint was dismissed at the close of the plaintiff's case, and from the judgment entered upon that dismissal this appeal is taken. It cannot be disputed that the jury would have been bound to find upon the evidence that the scaffold upon which Stewart stood at the time of the accident was improperly constructed, and that its fall was the direct result of that improper and unsafe construction. It is claimed by the defendant that the construction of the scaffold was a detail of the work, for the performance of which he had furnished sufficient proper material, and that it had been intrusted to men who were competent for that purpose. He insists that these men were co-servants of Stewart, engaged upon the same work, and if they failed either to use proper material which had been furnished, or to put it together in the proper way, so that the

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scaffold was safe to stand upon, their failure was the negligence of a co-employee of Stewart's, for which the defendant was not responsible. He invokes the rule laid down by the Court of Appeals in *Butler v. Townsend* (126 N. Y. 105), and by this court in the case of *McCone v. Gallagher* (16 App. Div. 272). The learned court at the Trial Term held that the facts proved brought the case within that of *McCone v. Gallagher* (*supra*), and applying the rule laid down in that case, dismissed the complaint.

It appears that one Montague was the superintendent of the defendant in charge of the construction of the building, and had the control and management of it. It became necessary on a certain day to build this scaffold for the use of the bricklayers and three men were set to work upon it. At the place where the scaffold subsequently fell, it was supported by two uprights, one placed upon the other. From the upper one to the wall was placed what was called a putlock, nailed to the upright at one end, and at the other end inserted in the wall. To make the scaffold safe it was necessary that the upright which supported the inner end of the putlock should be strongly braced. It appeared from the testimony that three men were at work upon the scaffold in this place; that the upright had been erected and the putlock nailed to it and inserted in the wall, but no braces had been placed to steady the upright. At that stage of the work the superintendent called away two of the men who were at work, leaving a single man, who was then at work upon the floor of the scaffold. It does not appear whether this person was a skilled scaffold builder or not. It does appear, however, that the scaffold was completed shortly after the men were taken away from the work, and the bricklayers were set to work upon it the next morning. No braces were put upon the upright, but it was permitted to remain in the condition in which it was left at the time the superintendent took the two men from the work. The plaintiff insists that this case is not within the rule laid down in the case of *McCone v. Gallagher*. In that case the scaffold was used by carpenters who were at work upon the inside of a building. It was the duty of the carpenters to erect the necessary scaffolding, and the defendant, who was the contractor, had supplied a sufficiency of proper material to be used for that purpose. The material selected by the carpenters, however, was not proper, and

the scaffold was on that account defective. The defendant, however, took no part in the construction of it, and exercised no control over it, but the carpenters constructed it as they saw fit, using whatever material they chose to select. The plaintiff there, who was a carpenter, but who had taken no part in the construction of the scaffold, went upon it and was injured by its fall while he was engaged in his work. The court applied the rule laid down in the case of *Butler v. Townsend*, and held that the scaffold was a mere appliance of the work, and not a place upon which the work was to be done; that the building of it was only a detail of the work to be performed by the men who were engaged in it, and that if the master furnished sufficient proper material to be used in the construction of the scaffold, he was not liable for negligence to one who was hurt by reason of its defect, although the person building the scaffold had erred in his selection of material to be used for that purpose. But in that case it was said that, to establish a cause of action for such an injury, the plaintiff must prove, in addition to the fact that there was negligence in the selection of the materials for the building of the scaffold, the additional fact that the master, or some one standing in the relation of representative of the master, assumed to construct the scaffold, and then directed the employees to use it as a constructed scaffold. In this case the jury might have found from the evidence, that Montague, the superintendent, who stood in the relation of master towards Stewart, had taken charge of the construction of the scaffold so far that he called the men who were engaged upon it away from it before it was properly completed, and this caused it to be left in an unsafe condition, and because of his act the scaffold was not properly completed. They might also have found upon the evidence that there was not sufficient material furnished to the men at work upon the scaffold to properly brace it. Because of those two facts the case is not, as we think, within the case of *McCone v. Gallagher*, but is within the exception stated in that case, and there was sufficient in the evidence to warrant the jury in finding that the defendant was guilty of negligence.

The case of *McCone v. Gallagher* was decided in April, 1897. The accident which is the subject of this litigation occurred on the 23d of November, 1897. On the thirteenth of May in that year

the Legislature passed the Labor Law, so called, which is chapter 415 of the Laws of 1897. That law took effect on the first day of June. At the time that law was passed, the rule laid down in *Butler v. Townsend* (126 N. Y. 105) was thoroughly settled as the law of this State, fixing the liability of a master towards his employees in the construction of scaffolding upon which it was necessary for the employees to stand to do their work. That rule was, that a scaffold erected for workmen is not a place in which their work is to be done within the meaning of the rule requiring the master to furnish a suitable place in which to do his work, but it is an appliance or instrumentality by means of which the work is to be done, and that if the master furnished proper material with which to build the scaffold he was not liable for the negligent act of one of his employees in building it; but that if any employee at work upon it received an injury because of the defect in it, it was the negligence of a fellow-servant for which the master was not liable. That rule had been laid down by the Court of Appeals, upon careful consideration, in the face of vigorous dissent, but had been adopted by the court and followed by the other courts of the State. That being the condition of the law as laid down by the courts, the Legislature, in the Labor Law, enacted that any person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure, shall not furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances, which are unsafe, unsuitable or improper, or which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged. (Laws of 1897, chap. 415, § 18.) This statute has changed the rule as laid down by the Court of Appeals. By it the Legislature has put upon the master the duty of furnishing a safe and proper scaffolding on which the employee is to do his work. The making of the scaffold is no longer a detail of the work, the responsibility for which is imposed upon the servant, but the scaffold is regarded as a place furnished by the master upon which the servant is to work, and the master is forbidden to permit that place to be unsafe, unsuitable or improper, but is bound so to construct it as to give proper protection to the life and limb of the



person who is engaged upon it. The duty, therefore, has become the personal duty of the master as distinguished from the duty of the servant, and the rule which charged the neglect to perform the duty upon the servant, so that another servant having been injured by it could not recover from the master, has been abolished. The rule which now exists with regard to the building of scaffolds is that it is a personal duty of the master to use reasonable care to see that the scaffold furnished is not unsafe, but is safe and proper for the use for which it is intended. Where the master has a personal duty in that regard, he is personally liable for its fulfillment. It is not enough that he selects a person of approved skill and fitness and furnishes to him the material with which to do the work, and that act alone will not relieve him from his responsibility. The person doing the work stands in the place of the master (*Flike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Crispin v. Babbitt*, 81 id. 516; *Corcoran v. Holbrook*, 59 id. 517), and if he is negligent, his negligence is the personal act of the master for which the master must answer. The rule laid down by the statute should have been applied in this case, and if it had been, there can be no doubt that, upon the evidence as it stood, the defendant was guilty of negligence; because there was practically no dispute that the scaffold as built was not sufficient for the burden that was put upon it, and that it gave way because of the failure to brace the upright as ordinary care and prudence required.

It is said, however, that the manner of the erection of the scaffold was easily seen and that the plaintiff's intestate was guilty of contributory negligence in consenting to use it when it was not sufficiently braced. But it clearly cannot be said as a matter of law that Stewart was guilty of contributory negligence in that regard. There was nothing to show that he had any knowledge of, or means of knowing, the manner in which this particular upright was secured. The upright was below the place where he was at work, and it was very clear that, standing there, he was unable to see it, and there is nothing to show that his attention was called to it or that he had either reason or opportunity to observe it. He was not called upon to inspect the scaffold to ascertain whether it was safe, but he had a right to assume that the master had performed his duty in that regard. He was, therefore, clearly not guilty of contributory neg-

ligence as a matter of law, and indeed the jury would not have been justified in finding that he was guilty of contributory negligence by reason of any facts which are made to appear in the case. The place where he was at work was between the sixth and seventh floors. The floors below were to have been arched between the beams and filled in with brickwork. They were not filled in above the first floor, but from the place where the men were at work, down to the first floor, the building was entirely open, and when Stewart fell he fell through five floors, and struck upon the first floor above the basement. Section 20 of the Labor Law requires that all contractors when constructing buildings in cities where the plans and specifications require the floor to be arched between the beams, or where the floors or filling in between the floors are of fire-proof material of\* brickwork, shall complete the flooring or filling in as the building progresses to not less than within three tiers of beams below that on which the iron work is being erected. (Laws of 1897, chap. 415, § 20.) As it appears in this case that this statute had not been complied with, and the floors had not been filled in to within three tiers of beams, it is insisted by the plaintiff that that violation of the statute of itself constitutes negligence by reason of which the defendant was liable for this accident. The violation of a statute or of a municipal ordinance which causes an injury to any person, is *prima facie* evidence of negligence on the part of the law breaker which affords sufficient reason for charging him with liability for the accident. (S. & R. Neg. § 467.)

But that only takes place where the violation of the law can be said to have been in some way or to some extent the cause of the injury. The mere fact that a person has violated a law is not sufficient to charge him with liability for an accident unless the violation of the statute has something to do with the occurrence of the accident. It is quite true that in this case the law was violated and that Stewart was killed, but the killing of Stewart resulted purely from the breaking of the scaffold. The failure to fill in the floors under the place where he was at work had nothing whatever to do with the thing that caused his death. The fact that the floors were open was a condition which existed at the time and place where the

\* *Sic.*

accident occurred, but there is nothing from which the jury would have been justified in finding that the accident would not have occurred had the floors been closed for two tiers higher up than they were, or that he would have received any less injury in that case. For that reason the failure to obey that portion of the law is not sufficient to charge the defendant with negligence. But if it were, the fact that the floors had not been filled in as the law required was perfectly apparent to Stewart as to everybody else, and if he consented to go to work upon the scaffold above the place where these openings were, knowing, as he must, that the openings existed, it was clear that he took the risk himself; and if leaving the openings was negligence which would charge the defendant, going to work above them with knowledge that they existed was equally contributory negligence on the part of Stewart which would prevent his recovery.

But for the reasons given above we are of the opinion that the judge erred in dismissing the complaint and that this judgment should be reversed, and that there should be a new trial, with costs to the appellant to abide the event.

BARRETT, PATTERSON and O'BRIEN, JJ., concurred.

Judgment reversed, new trial ordered, costs to appellant to abide event.

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ADELE W. LEACH, Respondent, v. FRIEND C. HAIGHT and I.  
MARSHALL FREESE, Appellants.

*Action against brokers to recover margins—examination of the defendants before trial to show that the transactions reported by them were fictitious.*

In an action to recover money deposited with brokers as margins for certain dealings in stocks which, the plaintiff alleges, were never bought or sold for her as she had ordered, the brokers having rendered to her accounts of fictitious transactions and misappropriated her moneys, the plaintiff, upon showing that she cannot get the information from the Consolidated Exchange, where the transactions were alleged to have taken place, or from the Exchange Clearing House, is entitled to an examination of the defendants, the brokers, before trial, although they allege that they have preserved no records that will show what their transactions were, and that all the accounts rendered by them were true.

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APPEAL by the defendants, Friend C. Haight and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 6th day of October, 1898, denying the defendants' motion to vacate an order for their examination before trial.

*H. W. Simpson*, for the appellants.

*Edwin R. Leavitt*, for the respondent.

PATTERSON, J. :

An order for the examination of the defendants before trial and requiring them to produce books and papers for inspection having been granted and served, the defendants moved to vacate it. That motion was denied, so far as the examination of the defendants as witnesses is concerned, but the requirement that books and papers be produced was stricken out. The defendants now appeal from the order denying the motion to vacate.

The question is, whether the plaintiff is entitled to the examination directed. She sued to recover back moneys deposited with the defendants as margins for certain dealings in stocks. She declares that the defendants never bought or sold stocks for her as she had ordered, but rendered accounts of fictitious transactions, and that they have misappropriated her moneys. They state that all the accounts rendered by them were true, and that transactions resulting in the loss of all the plaintiff's money, except a small balance, were made by them as their accounts represent. They state that they were members of and operators on the Consolidated Exchange, and that the transactions they refer to were had on that exchange. The plaintiff swears that she learned that all the dealings of the defendants on the Consolidated Exchange on the days on which they claim to have bought shares for her did not equal in amount the transactions they swear were had by them for her. The defendants allege that they have preserved no records that will show what those transactions were; that they were had through various brokers whose names they do not now know and have no means of ascertaining. In other words, they desire to escape an examination for the reason of an alleged inability to answer questions. What the plaintiff desires is to examine the defendants to find out just what

the defendants did with her money. She has made out what appears *prima facie* to be a case of fraud.

It is not to be disputed that, if the defendants misapplied the plaintiff's moneys, they are liable in this form of action. (*Prout v. Chisolm*, 21 App. Div. 54.) She shows that she has no way of ascertaining what the defendants did with her money, except by examining them, and she declares that it is her purpose to use that examination on the trial. She must get the information from them or go without it. She cannot get it from the Consolidated Exchange or the Exchange Clearing House, for reasons stated in her affidavit. An order for the examination of the defendants, under such circumstances, is authorized. The question was discussed and disposed of in *Dyett v. Seymour* (50 Hun, 276), which was an action against brokers similar to this.

It is claimed that the order cannot be sustained because the affidavit of the plaintiff is upon information and belief alone, but she discloses in her affidavit the grounds of her belief as to the fictitious character of the alleged purchases and sales, namely, depositions of various officers of the Consolidated Exchange, showing that on numerous dates, when the defendants charged the plaintiff with purchases and sales of stocks, they had not cleared in their whole business on the Exchange, on which their operations were supposed to be conducted, as many stocks as they pretend by their statements to have bought or sold for the plaintiff. The case, therefore, differs from *Jiminez v. Ward* (21 App. Div. 387) in that regard.

The order appealed from must be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, RUMSEY and O'BRIEN, JJ., concurred.

Order affirmed, with ten dollars costs and disbursements.

SARAH. RAPPAPORT, Appellant, v. SIMON WERNER and Others,  
Defendants; HARRY WERNER, Respondent.

*Action against tort feasons — they are severally liable — a failure to serve one is not a ground for striking the case from the calendar.*

An action against tort feasons to recover damages for alleged wrongdoing, should not be stricken from the general calendar on the ground that one of the parties defendant has not been served with the summons, as in such case each defendant is severally, as well as jointly, liable, and the fact that one defendant is not served does not stay the action as against the others.

APPEAL by the plaintiff, Sarah Rappaport, from an order of the Supreme Court, made at the New York Trial Term and entered in the office of the clerk of the county of New York on the 21st day of June, 1898, striking the cause from the calendar.

*Abraham H. Sarasohn*, for the appellant.

*Charles L. Cohn*, for the respondent Harry Werner.

PATTERSON, J. :

The order appealed from, by which this cause was stricken from the general calendar, was erroneously made. The action was against tort feasons, each of whom was charged with responsibility for the same alleged wrong. One of the defendants was a copartner of the plaintiff. The case was stricken from the calendar on the ground that he was a necessary party, and that as he was not served with the summons the cause was not in a condition to be put upon the calendar. That defendant was made a party on the record, but he was not served with process. Under the allegations of the complaint, each defendant was severally, as well as jointly, liable, if there is any liability at all. Whether the action can be maintained ultimately, is not the question that was before the court on this motion. It was a common-law action, and in such an action the fact that one defendant severally liable is not served, does not stay the action as against others who are severally liable. If the summons is issued against all and only served on one or more severally liable, the plaintiff may proceed against those served as if they were the only defend-

ants named. That is specially provided by section 456 of the Code of Civil Procedure. Those served must answer for their wrong. The case was properly on the calendar for trial, and the order must be reversed, with costs, and the case restored to its proper place on the calendar.

VAN BRUNT, P. J., BARRETT, RUMSEY and O'BRIEN, JJ., concurred.

Order reversed, with ten dollars costs and disbursements, and case restored to its place on the calendar.

CECELIA TOPLITZ and SELMA BRILL, Respondents, v. LOUIS BAUER and Others, as Executors, etc., of CHARLES BAUER, Deceased, Appellants.

*Pledge of a life insurance policy—waiver by the pledgee of his right to dispose of it without notice—consideration for the waiver—damages recoverable where the policy is surrendered.*

Where a life insurance policy has been pledged as collateral to a promissory note under an agreement that, in case of default in payment, "the legal holder of the said promissory note is hereby authorized to surrender to the company said policy, or to sell the same without demand and notice at public or private sale or otherwise," the right to dispose of the policy without notice may be waived by a subsequent understanding of the parties after default in payment, the legal effect of which is to entitle the pledgor to a notice before the pledgee may dispose of the policy.

*It seems*, that a consideration is not necessary to sustain such waiver.

Where, in such case, the policy has been surrendered in consideration of the payment of a certain sum by the company to the pledgee while the insured is suffering from an incurable disease, from which he soon thereafter dies, and the surrender has involved the loss of the whole amount of the policy over and above the amount of the debt—it being impossible at the time of the surrender to obtain in a responsible company another insurance policy upon the life of the dying man—the pledgor is entitled to recover of the pledgee the face value of the policy at the time of its surrender, with interest from that date.

APPEAL by the defendants, Louis Bauer and others, as executors, etc., of Charles Bauer, deceased, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of New York on the 31st day of May, 1898, upon the ver-

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dict of a jury, and also from an order entered in said clerk's office on the 1st day of June, 1898, denying the defendants' motion for a new trial made upon the minutes.

The amount of the policy in question in this action, which was issued by the Mutual Life Insurance Company of New York on the life of George Lisner, was \$8,000, and the verdict rendered was for \$8,164.32, that amount, with interest from the date of surrender.

*Wm. B. Hornblower*, for the appellants.

*Louis Marshall* and *Henry Brill*, for the respondents.

PATTERSON, J. :

This action was brought to recover damages for the alleged conversion by the defendants' testator of a policy of life insurance, pledged by the plaintiffs' assignor as collateral security to a loan made by the testator, Charles Bauer, on the 16th of July, 1890, to Rosa Lisner (the plaintiffs' assignor) and George Lisner, her husband, the latter being also the assured mentioned in the policy of insurance pledged. When the loan was made, Rosa and George Lisner delivered to Charles Bauer an instrument dated July 15, 1890, by which they transferred and set over to him all their right, title and interest in and to a certain policy of life insurance issued by the Mutual Life Insurance Company of New York on the life of George Lisner, and in the same instrument they constituted Charles Bauer their lawful attorney to take all proceedings necessary for the recovery and collection of any sums that might fall due under the policy. They also, at the same time, made and delivered to Charles Bauer their promissory note by which they promised to pay, five months after date, to their own order, \$1,100 at 120 Broadway, New York city. In connection with, and annexed to, this note was an instrument signed by Rosa Lisner and George Lisner, in which they declared that they had deposited with Charles Bauer, as collateral security for the note, policy No. 137,484 of the Mutual Life Insurance Company of New York on the life of George Lisner, and that in case of the non-performance of the terms contained in the note, or in case of the failure of the subscribers to pay any and all premiums, premium notes or interest on premium notes, coming due or which may be a lien on the above-named policy dur-



ing the continuance of the aforesaid note, etc., "then and in either such case the legal holder of the said promissory note is hereby authorized to surrender to the company said policy, or to sell the same without demand and notice at public or private sale or otherwise, in this or any other place at the option of said legal holder." Other provisions are contained in the instrument annexed to the note authorizing the holder of the note to surrender the policy or collect it in the event of certain contingencies, but they are not material to the controversy at present. By the terms of the note, it became due on the 16th of December, 1890. It was not then paid, but payment was extended and other extensions were subsequently granted in writing, the last written one being on May 10, 1893, when the time was extended to June 10, 1893, and payment of interest on the note to March 29, 1893, was acknowledged. We shall assume for the purposes of the decision of this case, that up to June 10, 1893, at least, the relations of the parties and their rights were the same as those originally constituted when the loan was made and the security given on the 16th of July, 1890.

Neither the principal nor the interest was paid on June 10, 1893, and the Lisners thereafter and prior to the 1st of July, 1893, had conversations and negotiations with Charles Bauer and with his brother Louis Bauer respecting further indulgence upon the note. In all that was said and done by Louis Bauer from the beginning to the end of the transactions with the Lisners, he was the representative and agent of Charles Bauer, and his authority to bind Charles Bauer is in no way questioned. It appears that Charles Bauer left for Europe about the 1st of July, 1893, and returned on the 6th of October, 1893. During his absence, many interviews were had between Rosa Lisner and Louis Bauer respecting the payment of the loan and the redemption of the security. There is a conflict between the testimony of Rosa Lisner and Louis Bauer as to the substance of those interviews, but both parties agree that they related not only to an extension of the time of payment of the note, but that they specifically referred to the disposition to be made of the policy of life insurance. The determinant facts of the case may be taken up for consideration as of the date of September 27, 1893, when a letter signed "Chas. Bauer, S.," was sent to Rosa Lisner, which is as follows:

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"Some time since you informed me that your brother-in-law was going to take care of the loans on the policies of your husband's life. So much time having elapsed, I beg to inquire if it is still his intention to do so. If not, I wish you would make arrangements with some one else to take up these loans, as my parties now insist on either the principle\* or interest.

"Very truly yours,

"(Signed) CHARLES BAUER, S."

That letter was written by one Solms, a clerk of Charles Bauer, and, as Solms swears, in the ordinary course of his business and employment. It will thus be perceived that, at the date of that letter, it was known that Rosa Lisner was making efforts to procure money for the payment of the loan and that no time was fixed for its payment. Subsequently to that date, and about the 7th of October, 1893, Rosa Lisner had a further conversation with Louis Bauer concerning the loan and the policy. It was about the seventh of October, the day after Charles Bauer returned from Europe, and she and one of her daughters state that they also had conversations with Charles Bauer on the same subject after his return. The rights of the parties to this action depend very largely upon what was said in those conversations. There is no doubt that they related to the policy of insurance pledged as collateral and what should be done with it and not merely to an extension of the time of payment of the loan. Louis Bauer swears that he stated to Mrs. Lisner and her daughter that, unless the loan were paid off the first business day before the twelfth of October, the collateral would positively be disposed of; and that they said that was fair, if they did not pay the note by that time to "go ahead and sell out the collateral." The Lisners, on the contrary, swear that nothing was said about the first business day before the twelfth of October, nor was any date fixed at which the collateral might be surrendered. They also testify that the money to pay the loan was expected from Mr. A. Lisner of Washington, a brother of George Lisner, and that Mrs. Lisner stated to Charles Bauer that if he were reluctant to wait, or could not wait longer, she would sell a policy of life insurance belonging to

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\* *Sic.*

her and issued by the Connecticut Mutual Insurance Company, from the proceeds of which she would pay off the Bauer loan, and that Charles Bauer said that, in the condition of health of George Lisner, and (in substance) the distress of Mrs. Lisner and her family, he would not permit such a sacrifice to be made. The jury, by the verdict, necessarily found that the story of Mrs. Lisner and her daughter was true, and that no time, therefore, was fixed at which payment must be made to save the collateral from forfeiture.

On the 13th of October, 1893, Louis Bauer surrendered the policy of the Mutual Life Insurance Company and received therefor \$1,494. A few days after that, upon receiving information that the policy had been surrendered, Mrs. Lisner called upon Charles Bauer and protested against the act of Louis Bauer in surrendering the policy. Efforts were made to have it reinstated by the Mutual Company, but that company refused to do so in consequence of the precarious state of the health of the assured. He died some six months afterwards.

There is evidence that Charles Bauer, in October, after the surrender of the policy, declared that Louis had surrendered it knowing that Charles had promised to wait, and suggested that efforts be made to have the policy reinstated by the company, and that Charles Bauer admitted that he promised Mrs. Lisner to wait until Mr. Lisner of Washington could remit the money. This conversation, it is true, related to the payment of interest and not principal, but it will be observed that in the letter of September 27, 1893, what was required was the payment of *either* principal or interest. Upon the foregoing state of facts, the question is whether there was a wrongful conversion of the policy of life insurance.

Notwithstanding the assignment, dated July 15, 1890, of that policy, the relations existing between Bauer and Mrs. Lisner were only those of pledgor and pledgee, and, under ordinary circumstances, before the collateral security could be resorted to, notice of sale would have been necessary. The right to redeem the pledge at common law was one that could be cut off in no other way. The effect of a default in payment of the debt would give to a pledgee a right to sell, but the forfeiture could not accrue without notice of sale. (*Patchin v. Pierce*, 12 Wend. 61; *Bryan v. Baldwin*, 52 N. Y. 232; *Stearns v. Marsh*, 4 Den. 227; *Millikin v. Dehon*, 10

Bosw. 325; *Nelson v. Edwards*, 40 Barb. 284.) But parties may make their own contracts as to any disposition of a pledge (*Baker v. Drake*, 66 N. Y. 518; *Genet v. Howland*, 45 Barb. 560; *Milliken v. Dehon*, 27 N. Y. 364); and undoubtedly that was done by these parties when authority was conferred upon Charles Bauer to surrender or sell the policy on default in the payment of the principal indebtedness, and that stipulation of their contract would have run through the whole transaction and been operative down to October, 1893, unless the contract were modified. (*Williams v. United States Trust Company*, 133 N. Y. 660.) But in this case the jury have found that the contract was modified; that modification consisting of a waiver of the right to sell on the ultimate default until Mrs. Lisner could have an opportunity of raising the money to make payment to Charles Bauer. The jury found that no time was fixed at the October interview. Where there is no time fixed for the redemption of a pledge (*Wilson v. Little*, 2 N. Y. 448), or *where the time has been fixed but has been rendered indefinite by a subsequent agreement between the parties*, it is not competent for the pledgee to sell a pledge without a proper demand and notice. (*Pigot v. Cubley*, 15 C. B. [N. S.] 701.)

That was the situation of this policy of insurance at the time it was surrendered by Louis Bauer. The understanding, as the jury must have found it to be, was not merely one extending the time of payment, but the parties were expressly dealing with the preservation of Mrs. Lisner's right to redeem the security; and we think, on the whole evidence, that the jury was justified in finding that there was a parol consent to waive, equivalent to a modification of the right of Bauer to resort immediately and without notice to the surrender of the policy for the payment of the debt. Thus, there is established by the evidence and the finding of the jury thereupon, that there was a waiver of the right to forfeit the policy, and we have to consider the legal effect of that waiver. The contention is made that it was ineffectual to operate any change in the rights of Bauer, because no consideration passed to support the waiver. It is not necessary to decide in this case whether a new consideration would be required to support a mere promise to extend the time of payment of the loan. That is not the question here. Suing to recover upon a loan is one thing; the right to resort to a forfeiture

of the pledge is another and separate thing. It was the right of the pledgee at common law to redeem the pledge at any time before actual foreclosure of that pledge, whether the creditor had pursued his remedies to recover the debt or not. By the contract between the pledgor and pledgee in this case, the strict common-law right of the pledgor to redeem was abandoned, but by the waiver of the privilege which the pledgee had under that contract there was a reinstatement of the pledgor's right to a notice before forfeiture. If the pledgee, before resorting to the security, had recalled the waiver and informed the pledgor of his intention to sell, possibly he might lawfully have done so. But there was a specific understanding, as the jury must have found, not to resort to the security at once, which necessarily implied that the right to redeem still continued. Was a consideration required as matter of law to support that waiver? Counsel for the appellant relies upon the case of *Williams v. Stern* (L. R. [5 Q. B. Div.] 409) as holding that a consideration was necessary. It was held in that case that the promise of the pledgee after default to wait for a week for the payment of the indebtedness, did not preclude him from resorting to the security, because the promise to postpone the day of payment was not supported by any consideration. The contrary to that was held in *Albert v. Grosvenor Investment Company* (L. R. [3 Q. B.] 123), but it would appear that the latter case was overruled by the former, notwithstanding that there is a distinct difference between the two cases. In *Williams v. Stern* it was held that there was *no evidence of a waiver* by the defendant of a right to resort to the security. In *Albert v. Grosvenor Investment Co.* the pledgee had taken possession of the goods and had agreed that he would not sell them, provided a sum of money were paid before a certain date. The money was tendered in due time, but the pledgee sold before the time and the court held him liable in trover. Here, as in *Albert v. Grosvenor Investment Company*, there was an express waiver of the right presently to resort to the security, and such a waiver comes within the rule laid down by the courts of this State respecting waivers of forfeitures. It is a rule not altogether in analogy with that of a waiver of strict performance of contracts for doing work by builders and others, but it is the same rule as that applied in cases of claimed forfeitures of leases, as in *Ireland v. Nichols* (46 N. Y. 413), or policies of life insurance,

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as in *Titus v. Glens Falls Insurance Co.* (81 id. 419). In the case last cited, it is said: "It may be asserted broadly that if, in any negotiations or transactions with the insured after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to *do some act or incur some trouble or expense*, the forfeiture is as matter of law waived, and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel." (Citing cases.) There is nothing in *Armstrong v. The Agricultural Insurance Co. of Watertown* (130 N. Y. 560) which affects the principle stated in *Titus v. Glens Falls Insurance Company*, in which latter case it is also stated that "forfeitures are not favored in the law, and this doctrine of waiver is not peculiar to insurance policies, *but is applicable to all cases of forfeiture*." The language of the court in *Insurance Company v. Norton* (96 U. S. 234) applies directly here. "Grant that the promise to extend the note is without consideration, and not binding on the company — which is perhaps true as well when the promise is made before maturity as when it is made afterwards — still it does not take from the company's act the legitimate effects of such act upon the forfeiture of the policy. Perhaps the note might be sued on in disregard of the extension, but if it could be, that would not annihilate the fact that the company elected to waive the forfeiture by entering into the transaction. If it should repudiate its agreement, it could not repudiate the waiver of the forfeiture, without at least giving to the assured reasonable notice to pay the money."

We are of the opinion that there was a waiver of the right to surrender the policy based upon the continued efforts of Mrs. Lisner to get the money from her brother-in-law in Washington, or the prevention of her disposing of the Connecticut company policy, and the application of its proceeds to the payment of Bauer's loan. There is no question of tender involved in this case. The pledgee sold the property notwithstanding the waiver, and there was no direct tender to him necessary. (*Stearns v. Marsh*, 4 Den. 227).

The only remaining question is as to the measure of damages. The appellant's contention is that the surrender value of the policy is all that could be recovered. Undoubtedly the general rule in

actions of conversion is that the measure of damages is the value of the property at or about the time of the conversion, but it is necessary to take into consideration the peculiar character of this pledge and what was done with it. As was said in *Whitehead v. N. Y. Life Ins. Co.* (102 N. Y. 143), if we should limit the recovery to the surrender value, it would simply be adding the sanction of the court to the unauthorized surrender and make it valid. Here was a contract of insurance upon the life of a man then suffering from an incurable disease, and who died within six months after that contract was destroyed by the wrongful act of Charles Bauer's agent. It was impossible to reinstate that contract. The insurance company was not bound to reinstate it, and the necessary consequence of the surrender was the loss of the whole amount of the insurance over and above the debt due to Bauer. It may be said that ordinarily the measure of damages would be whatever would make good the loss to the assured occasioned by the surrender, but it is obvious in this case that no other insurance could be obtained in a responsible company upon the life of a dying man, and there is no measure of damages that can be resorted to except that which was applied on the trial.

The judgment and order appealed from should be affirmed, with costs.

BARRETT, RUMSEY and O'BRIEN, JJ., concurred.

Judgment and order affirmed, with costs.

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PHILIP STERNBACH, Respondent, v. YETTE FRIEDMAN. Appellant,  
Impleaded with Others.

*Principal and surety — subrogation of the latter, on paying the debt, to the creditor's rights in collateral — the creditor is bound to account for the collateral.*

Where a creditor, having a debt secured by certain warehouse certificates, the property of the debtor, and also by a bond and mortgage given by a third party, elects to enforce payment by a foreclosure of the bond and mortgage, the mortgagor is entitled to be subrogated in equity to the rights of the creditor in the warehouse certificates; and where the amount of the liability cannot be ascertained until a judicial accounting is had, a court of equity has full

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power to define the rights of the parties as to both classes of security and to control in the hands of the creditor the security to which the mortgagor may be entitled on a full judicial determination of the extent of his liability and the satisfaction of the amount found due.

A decree made on such an accounting should provide for the substitution of the mortgagor in the place of the creditor upon the ascertainment and payment of the amount of the liability.

A creditor who himself, or by his attorney acting within the scope of his authority, so deals with securities to which a surety may be entitled by way of subrogation as to lose, or destroy them, or create an opportunity for a third party to abstract them, is accountable for the value of the securities to the surety paying the debt, or whose property is resorted to for the purpose of securing payment thereof.

APPEAL by the defendant, Yette Friedman, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 24th day of March, 1898, upon the decision of the court rendered after a trial at the New York Special Term.

*David Leventritt*, for the appellant.

*Emanuel J. Myers*, for the respondent.

PATTERSON, J. :

This is an appeal from a judgment entered in favor of the plaintiff, in an action for the foreclosure of a mortgage. The record is voluminous, and the evidence as contained in it is filled with such contradictions as show deliberate false swearing by witnesses on one side or the other. The appellant, Mrs. Friedman, made and executed the bond and mortgage mentioned in the complaint, and upon the trial it was conceded by her counsel at the outset, that she is liable for something thereupon, dependent upon the result of an accounting; and he claimed, substantially, that it was for him to prove an affirmative defense set up in the answer, and allegations which, if established, would require a reformation of the instruments. That defense is, that by mistake on the part of the defendant, Yette Friedman, and fraud on the part of the plaintiff, or those acting for him, the bond and mortgage were so drawn as to secure other and greater obligations than those Mrs. Friedman had agreed to assume. Certain facts are conceded, namely, that the plaintiff and one Marcus Rosenthal were copartners



in business in January, 1896; that a dissolution of that firm was in that month agreed upon; that the plaintiff was to receive payment or security for the payment of \$10,000, which he had put in as capital and also indemnity against liability for debts of the copartnership. It is also conceded that Mrs. Friedman was induced to make the mortgage sought to be foreclosed in this action and to join in the bond to which it was collateral, as security, but her contention is that it was only for the indebtedness of the firm to its creditors, and that the plaintiff's contribution to the capital was to be and was paid by the relinquishment to the plaintiff of certain warehouse certificates of the value of \$10,000. She alleges in her answer that such was her understanding of the terms upon which she was to give the bond and mortgage, and she prayed for a reformation of the instruments so that her liability might be limited to one for the indebtedness of the firm to its creditors. The negotiations preceding and the circumstances attendant upon the execution of the mortgage were made the subjects of extended inquiry in the examination of witnesses on the trial. Mrs. Friedman (the defendant) Rosenthal (her son-in-law), Mrs. Rosenthal (her daughter), Theodore Friedman (her son) and Jacob Baum (her brother) testified to a state of facts which, if true, proves that she was the victim of a gross fraud. She is an illiterate woman, totally unable to read or write. She testified that, being informed of the serious involvement of her son-in-law in his copartnership relations with the plaintiff, she was induced to attend twice at the office of the plaintiff's then attorneys, and that she agreed to give security for the debts of the copartnership, and that it was distinctly stated and admitted that the plaintiff's contribution to capital was paid back to him by the warehouse, or, as they are called, whisky certificates. Rosenthal, Jacob Baum and Friedman testified to the same thing, and Rosenthal and others, who were present at the time the bond and mortgage were executed at Rosenthal's apartment, also testified that when the papers were presented for execution and read by the attorney acting for the plaintiff it appeared from such reading that the warehouse certificates were referred to as having been taken as security and not as payment, and thereupon a protest was made, and the attorney promised that the error should be corrected before the papers were used. On the other hand, there is testimony given by the attorney

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referred to and by the stenographer to whom the papers were dictated, that at the office of the attorneys acting for the plaintiff the drafts of such papers were read in the hearing of Mrs. Friedman; that they contained the same provision respecting the warehouse certificates as in the executed instrument, and the notary public who took the acknowledgment of Mrs. Friedman at the time the papers were signed and delivered contradicts everything testified to by the defendant's witnesses concerning the alleged protest against, or criticism of, the contents of the papers when they were read by the attorney on the occasion last referred to. In that state of the evidence the justice at the Special Term held that the defendant Friedman had not made out by a preponderance of evidence a right to have the bond and mortgage reformed. On a critical examination of all the record, we fail to see what other disposition could have been made of this branch of the case. Everything depended upon the credibility of witnesses. In the irreconcilable conflict between them there are no circumstances to which we may give heed to turn the scale either way.

We must assume, then, that the bond and mortgage were to stand as security according to their terms, and it is not disputed that Mrs. Friedman occupies as to the plaintiff the relation of surety for Rosenthal, his debtor. Just at this point of the case is introduced the subject of subrogation of Mrs. Friedman to the right of the plaintiff to the warehouse certificates. It is claimed by the plaintiff that the pleadings are not in condition to give rise to an inquiry on that subject. But we do not so regard them. The history of these certificates and the relation of the parties to them came directly into the case. They are referred to in the answer by an allegation which sets up that they, at the time of the dissolution of the firm of Rosenthal & Co. were given to the plaintiff, either in payment or as security for the \$10,000 capital. The determination of the court below was that they were taken as security. The defendant Friedman prayed that the plaintiff and the defendant Rosenthal be ordered to account to her respecting all the debts, liabilities and obligations of the firm, the amounts paid thereon and the amounts still outstanding and payable, to the end that the amount due upon the said bond and mortgage might be ascertained and determined; and

that any and all securities held by the plaintiff as security for the performance of the condition of the bond be delivered to the defendant Friedman, *upon the payment by her of* the amount found due upon the accounting, and that she be in all respects subrogated to the rights of the said plaintiff with reference to said security, and that, in the event that the plaintiff cannot or shall not deliver such securities or any of them to the defendant, the value of said security be deducted from the amount found due. Thus the whisky certificates were drawn into the case. It plainly appeared that for the \$10,000 capital the plaintiff had two securities, one the whisky certificates and the other the mortgage. The plaintiff has chosen to resort to the latter, and to enforce it by foreclosure. It is necessary in the action to take an account to ascertain what, if anything, remained unpaid of the debts of Rosenthal & Co. If nothing so remained unpaid, and the mortgage is held by the plaintiff (as matter of fact) only as security for the \$10,000 capital, then it is not to be disputed that upon the payment of that amount of money the defendant Friedman would be entitled to be subrogated in equity to the rights of the plaintiff in and to the whisky certificates. If debts remain unpaid, the defendant Friedman would not be immediately entitled to the possession of the certificates, for under ordinary circumstances the creditor is entitled to hold his collateral until all that is due him is paid.

It is undoubtedly the law that a surety, as a general rule, is only entitled to subrogation upon the payment of the indebtedness of his principal to the creditor, but where a creditor holds as collateral security two funds, viz., property of the debtor and, in addition thereto, liability of a third party, a guarantor, and the creditor elects to look to the liability of the guarantor, and the amount of that liability cannot be ascertained until a judicial accounting, a court of equity has full power to define the rights of the parties as to both classes of security and to control in the hands of the creditor that to which the guarantor may be entitled on a full judicial determination of the extent of his liability, and satisfaction of the amount found due. (*Philadelphia & Reading R. R. Co. v. Little*, 41 N. J. Eq. 519.) It needs no citation of authorities to show that a surety who pays a debt for his principal is entitled to be put in the place of the creditor, and is also entitled to all the means which the creditor

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possessed of enforcing payment against the principal debtor ; nor that it is within the power of a court of equity, when the creditor applies for relief against the surety, to require the creditor to account for those things to which the surety may be entitled on payment, and to make a decree upon all the facts as they appear before it. That is simply the exercise of the ordinary power of a court of equity to determine all that is in contest between the parties to a suit before it and to settle equities definitively. Circumstances may be disclosed showing that it is impossible for the surety to know how much he must pay until an accounting is had between the creditor and the debtor, and it is appropriate to the final disposition of such a case that a decree should provide for the substitution of the surety in the place of the creditor upon ascertainment and payment of the amount of the surety's liability. Thus the court would have power to control all securities in the hands of the creditor. The power is not restricted because the rights of the parties are involved in an action to enforce payment by foreclosure of a lien given by the surety on his property.

The proofs in this case showed that Mrs. Friedman, upon payment of such amount as might be found due on the mortgage, might be entitled to subrogation to the rights of the plaintiff to the whole or some part of the whisky certificates. That depends on the result of the accounting. But the plaintiff has sought to discharge himself from any responsibility for those certificates, and in doing so has shown that Mrs. Friedman cannot have the actual benefit of them in this action. He contends and has endeavored to show that, in recognition of Mrs. Friedman's claims to those certificates and her right to control or have them applied, they were delivered into her possession, and that thus he is freed from all accountability concerning them. It appears from the record that these certificates were taken by the plaintiff from the safe of Rosenthal & Co. a day or two before the dissolution of that firm, and thenceforth, and until the 27th day of May, 1898, were always in the possession of one of the attorneys at law of the plaintiff. At some time shortly before the last-mentioned date, Rosenthal made application to that attorney for the certificates, desiring to use them in his own business and for his own purposes. The attorney was willing to aid Rosenthal in obtaining the certificates, but, as he states himself, he knew they could not be restored to Rosenthal without the consent

of Mrs. Friedman and, therefore, he declares he sent them by a messenger to Mrs. Friedman inclosed with a letter as follows: "Agreeable\* to your request, we herewith deliver to you the whiskey certificates held by us and which we surrender upon the distinct understanding that you accept the same without in any way or manner affecting or impairing the bond and mortgage given by you to Mr. Philip Sternbach." Reilly, the messenger, swore that he delivered the certificates and the letter in the form of a package to Mrs. Friedman. His testimony was contradicted by four witnesses. The trial judge did not believe him, but on the contrary held that "by blandishments and a bribe" Rosenthal induced Reilly to hand the package to Rosenthal's wife, who subsequently gave it to her husband and not to Mrs. Friedman. The trial judge found that the debtor got possession of the securities without the knowledge or procurement of the defendant Friedman, but held that it was against the will and without the fault of the plaintiff; that the proof was clear that neither the plaintiff nor those who were acting for him intended that the debtor should have the securities except with the consent of Mrs. Friedman, and the plaintiff was exonerated from all responsibility respecting those certificates.

The evidence is convincing that a flagrant fraud was perpetrated on Mrs. Friedman in dealing with these certificates. We are not disposed to hold, upon this record, that the attorney concocted that fraud in collusion with the defendant Rosenthal, for we would not be justified in acting upon mere suspicion. But the question here is, not as to responsibility for the fraud of Rosenthal and Reilly, but responsibility of the plaintiff for the loss or destruction, so far as Mrs. Friedman is concerned, of those certificates, to which by the admission of the attorney she was entitled, either absolutely or contingently and which it was his purpose to give into her possession. Where the creditor so deals with a security to which a surety may be entitled by way of subrogation as to lose it or destroy it, he is accountable for the value of that security to the surety paying the debt, or, as in this case, whose property is resorted to to pay the debt. As the learned justice at Special Term said, the rule is elementary that if the creditor loses or without the consent of the surety parts with security, the surety is discharged to the extent of

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\* *Sic.*

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the security. (Pollock Cont. 271; *Griswold v. Jackson*, 2 Edw. Ch. 460; *Sailly v. Elmore*, 2 Paige, 497; *Hayes v. Wurd*, 4 Johns. Ch. 123.) It is true that the degree of care required by the creditor is sometimes an important element in an inquiry of this character, but no such question arises here. The plaintiff's attorney assumed the performance of an act which he regarded as a duty respecting those certificates; he undertook to put them in the hands of Mrs. Friedman. Neither he nor the plaintiff may be responsible for the fraud by which they were intercepted so that they never reached her, but the question lies back of that, and is whether the loss to Mrs. Friedman is the result of negligence of the attorney and whether the plaintiff is responsible for that negligence. It is not the infidelity of Reilly nor the abstraction of the securities by Rosenthal that would discharge the surety, but the conduct of the creditor or his agent in so dealing with that security as to create the opportunity for Rosenthal to abstract it.

The facts connected with the attempt to deliver the warehouse certificates to Mrs. Friedman plainly appear. She never got them and never consented to their delivery to Rosenthal. He wanted them for himself, and overtures looking to that end were made by him to the attorney in whose custody they were. The plaintiff knew it; his testimony is: "I knew about the intention to deliver them; my brother told me." The plaintiff says they were in the attorney's possession, and he did not personally give the attorney any instructions about the delivery at all. "I did not see Mrs. Friedman about the delivery. I did not take the trouble to go and ask her whether she wanted them or not." The brother referred to is Morris Sternbach, who represented the plaintiff in matters connected with these whisky certificates and whose authority to bind the plaintiff is in no way questioned or repudiated. Morris Sternbach says the conversations respecting the surrender of the certificates were had principally between Rosenthal and himself. Rosenthal told him that if he could get the whisky certificates and convert them into money he could see a way of liquidating the debts of the firm as well as indebtedness due the plaintiff and Morris. Morris Sternbach told Rosenthal that the whisky certificates were collateral, and that he would not give them up except with the advice of his lawyer, and thereupon he, Morris Sternbach, told the

attorney that he had no objection to give up possession of the whisky certificates. To quote from his testimony: "I wanted Mrs. Friedman to have those certificates, and thereupon a letter was discussed between us (himself and the lawyer), which, however, I did not wait long enough to see. The letter I did not see. I simply discussed the tenor of the letter to be written to Mrs. Friedman and the certificates to have been\* addressed and to be delivered to Mrs. Friedman, as far as I knew." He also says: "I was perfectly willing to let Rosenthal have them (the certificates), and I wanted Mrs. Friedman to know they were given up. Perfectly willing to let him have them. I had no objection to that. \* \* \* I understood that if those certificates were delivered to anybody they were to be for Rosenthal's benefit directly and for the payment of the bond indirectly for the idea of extricating himself, and for the payment of his debts and to free Mrs. Friedman. \* \* \* I understood that Rosenthal wanted those whisky certificates in order to convert them into money for the purpose of extricating himself and to liquidate his debts to us, to my brother and thus free Mrs. Friedman from her bond. I did not know that Mrs. Friedman must consent to that under the circumstances." The attorney in his testimony states that in a conversation between himself, Rosenthal and a Mr. Todd (Rosenthal's lawyer) it was determined that the whisky certificates *should be sent direct* to Mrs. Friedman; that he had frequent conversations with Rosenthal upon the subject; that he never saw Mrs. Friedman concerning it, nor had any conversation with or communication from her upon the subject. All that he knew of any alleged wish or desire on the part of Mrs. Friedman to have these certificates emanated from Rosenthal or Mrs. Rosenthal, and he swears that the letter he wrote to Mrs. Friedman was based altogether upon what he heard from Rosenthal and his wife, and that the words "agreeable to your request" contained in that letter refer to a request believed to have been communicated through Rosenthal.

Here then is the simple case of an agent charged with an active duty as to negotiable securities, namely, to deliver them into the hands of a particular person conceded to be entitled to them; who gets all his information as to the wishes of that person from an individual interested in abstracting them; an agent

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\* *Sic.*

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who never takes the trouble to verify the representations that interested person has made to him, except by inquiring of those who from their situation would aid in his purpose; an agent who totally ignores the person entitled to the securities, and then, in reliance upon the statements of a party who he must have known was unworthy of belief, parts with them in such a way that they never reach the one entitled to them. The plain and obvious course, dictated by ordinary prudence, would have been for the attorney to inquire of Mrs. Friedman formally if she wanted the certificates, informing her that Rosenthal was applying for them upon the representation that she was willing he should have them. The attorney endeavors to excuse himself by alleging that Mrs. Friedman was unable to read or write, and that, therefore, communicating with her would have been an idle ceremony. But it would appear, to even the most unsophisticated person that that was the very reason he should have been zealous to see her personally and ascertain her wishes, or send some reliable person to her to inquire if she wanted the certificates, and in what way they should be delivered to her. These certificates are lost to Mrs. Friedman through the negligence of the attorney, and the question remains as to the responsibility of the plaintiff for that negligence. He knew of the intention to deliver them and made no objection. He did not take the trouble, as he himself swears, to do anything in the matter of their delivery. He left it altogether to his brother and the attorney. The attorney was acting within the scope of his authority; he had the right to believe that the delivery of the certificates was authorized by the plaintiff; that the duty to deliver them was imposed upon him by the plaintiff, and for his methods of dealing with those securities, the plaintiff is as much responsible as if he had dealt with them himself.

It is not the case of the fraud of an agent. We will take the attorney's own statement respecting his good faith, and then the fact remains that, for the want of proper inquiry or due notification to Mrs. Friedman of what was to be done with these securities, the opportunity was created for Rosenthal to cheat Mrs. Friedman out of them. If the plaintiff had personally acted with these certificates in the way his attorney did, there could be no doubt of the exoneration of the surety. Under the circumstances of this case, the attorney's acts and omissions were those of the plaintiff; and we



think Mrs. Friedman is exonerated from so much of the obligation upon the bond for the plaintiff's capital as is equal to the value of the whisky certificates on May 27, 1896, and that the lien of the mortgage as applicable to capital is released *pro tanto*.

These views require that the judgment be modified so that it shall be adjudged that the mortgage sought to be foreclosed in this action is a security to the plaintiff for unpaid indebtedness of the firm of Rosenthal & Co., and for the capital contributed by the plaintiff to that firm; but that Mrs. Friedman is entitled to be credited with the value of the whisky certificates on the 27th of May, 1896. The judgment should also be an interlocutory and not a final one. (*King v. Barnes*, 107 N. Y. 645.) It should provide for an accounting, and final judgment of sale and distribution should not be made until after confirmation of a referee's report upon such accounting, costs of appeal to appellants to abide event, and costs of action to be determined upon the application for final judgment.

VAN BRUNT, P. J., O'BRIEN, INGRAHAM and McLAUGHLIN, JJ., concurred.

Judgment modified to the extent stated in opinion, and interlocutory judgment ordered as therein directed, with costs of appeal to the appellants to abide event, and costs of action to be determined upon the application for final judgment.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. OWEN SULLIVAN, Appellant, Impleaded with JOHN SPAULDING.

*Evidence*—a determination of police commissioners is not a "conviction" under section 882 of the Code of Civil Procedure, and section 714 of the Penal Code.

The determination of police commissioners, in proceedings before them, imposing a fine or other punishment for dereliction of duty on the part of a member of the police force, is not a "conviction" within the meaning of section 882 of the Code of Civil Procedure, and section 714 of the Penal Code, which may, on his trial in a criminal action in which he is convicted of an assault in the third degree, be proved on his cross-examination in order to affect his credibility.

The conviction referred to in these sections is the same as that which would formerly have disqualified a person from testifying, and such as is reached after an orderly trial in a court of law, before a judge or petit jury.

APPEAL by the defendant, Owen Sullivan, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of

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the clerk of the county of New York on the 17th day of December, 1897, upon the verdict of a jury convicting him of the crime of assault in the third degree, and also from an order denying the said defendant's motion for a new trial.

The appellant, Owen Sullivan, a police officer of New York city, and John Spaulding, a station house doorman, were indicted for felonious and willful assault with a club upon a prisoner, John Dalton, whose real name is William Rooney. Sullivan had arrested Dalton for highway robbery, and the alleged assault took place in the station house after Sullivan and Spaulding had been ordered to conduct the prisoner to a cell. Dalton was subsequently convicted of the crime for which he was arrested, and is now serving a sixteen-year sentence in State's prison, from which he was brought to testify on this trial. The jury acquitted Spaulding, but found Sullivan guilty of assault in the third degree.

It appears that Dalton and a confederate assaulted one Hilderbrand, a clerk employed by the George Ringler Brewing Company, and took from him money and checks belonging to his employers; that the confederate escaped with the money and checks, but that Dalton was captured by Policeman Sullivan, taken by him to the station house and arraigned before the sergeant on the charge of highway robbery; that the sergeant ordered Sullivan to assist the doorman, Spaulding, in conducting the prisoner to a cell; that Sullivan, Spaulding and Dalton left the sergeant's desk for the prison, and that shortly afterwards Sullivan struck Dalton a blow with his billy. The versions given by Dalton and by Sullivan as to when the blow was struck are directly contradictory. Dalton's story is that after leaving the sergeant's desk, he was conducted by Sullivan and Spaulding to a cell, and that the door was shut; that thereafter Sullivan demanded, in a threatening way, the name of the confederate who escaped; that when the request was not complied with, Sullivan told Spaulding to open the cell door; that Spaulding did so, and that Sullivan entered the cell, again demanded the information, and then struck him several times over the head with his billy before he grasped and held it; that then the captain of the precinct appeared, told him to release the billy, and ordered Sullivan from the cell. Sullivan's testimony is that when Dalton was being con-

ducted to the cell, and before the cell was reached, he advised his prisoner to give information regarding the confederate; that Dalton thereupon struck him in the face; that this happened on the way to the cell, just after a bridge over an open court had been passed; that in self-defense and to prevent his prisoner from escaping, he struck Dalton once with his billy; that he was pushing Dalton, who was holding the billy, into the cell when the captain came up, ordered Dalton to release the billy and directed him to leave the prisoner.

*Frederick B. House*, for the appellant.

*Charles E. Le Barbier*, for the respondent.

O'BRIEN, J.:

The principal questions presented on this appeal are, whether the verdict is warranted by the evidence, and whether the court erred in admitting evidence of the appellant's record as a police officer.

A review of the testimony discloses that the questions upon the merits as to the defendant's guilt were disposed of by the jury upon close and conflicting evidence, and in view of the contradictory versions of the alleged assault, it is apparent that a slight variance in favor of the defendant would have turned the judgment the other way. The character and credibility of the witnesses were, therefore, important factors, and the admission of incompetent evidence relating thereto would have an especial bearing upon the conclusions to be reached. As affecting the defendant's testimony, his record as a police officer was introduced in evidence, and the substance of such evidence, and the grounds upon which it was admitted, may be seen from the following questions and answers, with the objections interposed by counsel and the rulings thereon by the learned judge presiding at the trial: "Q. You have been disciplined for clubbing have you not, before? [Objection.] By the Court: If he was convicted before of clubbing anybody or assaulting anybody, you may show it. [Exception.] Q. Haven't you been convicted of clubbing before? A. I was fined ten days' pay; yes. Q. When was that? A. 1892; I ain't sure. Q. See if this is right. On November 27th, 1891, you assaulted a citizen with a club and called him vile names, and were convicted of it and fined ten days! [Objection. Exception.] A. That is right; I was convicted of it. Q. Weren't you, on April 27th, 1894, convicted as follows: You

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assaulted and arrested and failed to convey a prisoner to the station house; fined five days? [Objection.] By the Court: That is a conviction. \* \* \* A. The assault part was dismissed. Q. Weren't you convicted of that, no matter what you did? A. I was fined five days for allowing a prisoner to escape. By the Court: Q. What were you fined five days for? A. For allowing a prisoner to escape. Q. Then you were convicted for allowing a prisoner to escape and you were fined five days' pay; isn't that right? [Objection.] A. Yes, sir. By Mr. Carpenter: Q. Isn't this the charge that was made against you: 'Assaulted and arrested and failed to convey a prisoner to station house?' A. Yes, sir. Q. And on that you were convicted? [Objection. Exception.] A. Yes, sir. \* \* \* Q. On June 25th were you convicted and fined three days on this charge: Absent from post and in liquor store? [Objection. Exception.] A. Yes, sir. Q. And on March 3rd, 1892, convicted and fined one day on this charge: 'Did not properly patrol?' [Objection. Exception.] A. Yes, sir. Q. And on March 26th, 1895, convicted and fined one day for being absent from post? A. What is that? Q. March 26th, 1895, absent from post one day? A. Yes, sir; one day. Q. November 26th, 1895, loitering, fined one day? A. Yes, sir. \* \* \* Q. Failed to return memoranda book at desk at expiration of duty, and fined one-half day for that? [Objection. Exception.] A. Yes, sir." After the judge had charged the jury, the request was made that, in considering Sullivan's evidence, the jury was entitled to take into consideration his record. To which request the court replied: "That, gentlemen, you are entitled to take into account on the question of his credibility—Sullivan's record which was read to you yesterday, or proved."

It will be noticed that the ground upon which the rulings were based was that the proceedings before the police commissioners, which resulted in fines or other punishment for dereliction of duty or infractions of police rules, were *convictions*, and, therefore, proof thereof on the defendant's cross-examination was proper, as affecting his credibility, under section 832 of the Code of Civil Procedure and section 714 of the Penal Code. The Codes provide in these sections that a person who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness, but that

the conviction may be proved for the purpose of affecting the weight of his testimony by his cross-examination, upon which he must answer any question relevant to that inquiry. It appears to us that the learned judge quite misapprehended the purpose and meaning of these provisions, and applied them to determinations which in no legal sense could be regarded as convictions. The reason for the enactment of the sections referred to is that, prior to the adoption of the Codes, a person convicted of a crime was entirely disqualified from testifying; and it was with the view to remove such disqualification and to make the person convicted of a crime competent to testify that they were passed, with the limitation, however, that "the conviction may be proved for the purpose of affecting the weight of his testimony."

The conviction mentioned in the Code provisions is the same as would formerly have disqualified a person from testifying. But, as held in many cases, it is only such conviction as is reached after an orderly trial in a court of law, before a judge or petit jury. The cases have further held that an actual judgment of the court is necessary to constitute a conviction. Thus, in *Blaufus v. People* (69 N. Y. 107), tried before the Code was enacted, in commenting upon the use of the word "conviction" in a statute against the subornation of perjury, it was said: "In ordinary phrase, the meaning of the word *conviction* is, the finding by the jury of a verdict that the accused is guilty. But in legal parlance it often denotes the final judgment of the court; \* \* \* to shut a person from the witness box \* \* \* guilt must be shown by a judgment; \* \* \* until a person found guilty of perjury by the verdict of a jury has received judgment and sentence from the court, he is not incompetent to speak as a witness." As stated, also, in *Schiffer v. Pruden* (64 N. Y. 52), "doubtless the word *conviction* ordinarily signifies the finding of the jury by a verdict that the accused is guilty, yet the word sometimes denotes the final judgment of the court. \* \* \* Thus the case of a witness rendered incompetent to testify by conviction for an infamous crime, has an analogy. The language of the law is that he is rendered incompetent by his conviction of treason, felony or *crimen falsi*, but to shut him from the witness box his conviction must be shown by a judgment."

Since the provisions of the Codes came into effect, making per-

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sons competent witnesses, notwithstanding their conviction for crimes or misdemeanors, a similar construction has been given the word conviction, and, as defined in the case of *Sacia v. Decker* (1 Civ. Proc. Rep. 56), "In legal parlance conviction denotes the final judgment of the court in passing sentence."

That the proceedings before the police commissioners are not of that nature, and that their conclusions can in no sense be properly regarded as legal convictions is evident, and thus the foundation upon which the rulings admitting such evidence were based was wanting.

Notwithstanding the fact that a wrong ground was assigned for admitting such evidence, we should not reverse the rulings made if, for any other good reason, the testimony was competent or it was made clearly to appear that the defendant was not prejudiced thereby. Bearing in mind, however, as we must, the great liberality, within the discretion of the trial judge, allowed upon cross-examination, we think the ruling cannot be sustained. It cannot be doubted that the evidence admitted was harmful to the defendant, and, therefore, the present case is distinguished from that of *Nolan v. Brooklyn City & Newtown Railroad Company* (87 N. Y. 68) where an exception was taken to the ruling of the court permitting a witness to be asked on his cross-examination if he had been expelled from the fire department, and it was held that the question was improper because the fact sought to be proved was neither pertinent to the issue nor did it relate to any specific fact which tended to discredit the witness or to impeach his moral character; but the ruling was allowed to stand as the error was not harmful, for the reason that the reply of the witness was so worded that no unfavorable inference could be drawn.

It is unnecessary to extend the argument to show the error, for the matter has been pointed out and fully discussed in the recent case of *People v. Dorthy* (20 App. Div. 308; *affd.*, 156 N. Y. 237). This was a case where the defendant, who was an attorney and counselor at law, was indicted for grand larceny, and at the trial, on his cross-examination, it was attempted by the prosecution to discredit his testimony by proving by him that he had been expelled from the Baptist church, and that in proceedings to disbar him from practicing as an attorney and counselor at law a referee and an

Appellate Division of the Supreme Court had found him guilty of several specific acts of larceny not connected with the one on trial, and also of suppressing evidence which should have been presented to a grand jury. In the opinion by the learned judge of the Appellate Division it was said: "It has never been the law that a witness may be compelled to testify to the conclusions of others to prove such moral degradation or to impeach him as a witness, except it be the conviction for a crime or such confinement in prisons or jails as would indicate a conviction. \* \* \* The reason of this distinction is plain \* \* \* he may be ignorant of the facts upon which the acts or conclusions of others are based \* \* \* and the witness may thus be injured and disgraced by results for which he is not responsible. \* \* \* A person under our system of jurisprudence can only be convicted of a crime after a fair trial, in the appointed way, where he can be fully heard in his defense, and where he can be protected by all the presumptions with which the law surrounds a defendant upon his trial for crime. A conviction upon such a trial may be properly shown to impair the credit of a witness; though it is the act of others, it is the deliberate act of the law upon a trial duly had before the court and a jury." In affirming the judgment the Court of Appeals held that, assuming that the prosecution has the right for the purpose of attacking the credibility of the witness in his own behalf to ask him whether or not he has been disbarred as an attorney of the court, it is not entitled, on his admitting the fact, to go further and require him to answer or explain all charges that had been made against him in the proceedings for his removal, and the fact that the witness has been expelled from a church does not impeach his credibility; and when testimony to that fact has no bearing on the main issue in the case, it is error to permit the prosecution to elicit it even indirectly from the defendant, in a criminal trial, upon his cross-examination.

The admission, upon Sullivan's cross-examination, of the decisions of the police commissioners as convictions being, therefore, erroneous and undoubtedly prejudicial, it follows that the judgment must be reversed and a new trial ordered.

BARRETT, RUMSEY and PATTERSON, JJ., concurred.

Judgment reversed and new trial ordered.

JOHN F. GHEE, Appellant, v. THE NORTHERN UNION GAS COMPANY,  
Respondent, Impleaded with Others.

*New York city — who are the "municipal authorities" thereof whose consent is necessary to the laying of gas mains through its streets.*

Since the passage of the Greater New York charter (Chap. 378 of 1897), the "municipal authorities" of that city, whose consent is made by section 61 of the Transportation Corporations Law (Chap. 566 of the Laws of 1890) a condition precedent to the laying of gas mains through the streets of a municipality, are the department of public buildings, lighting and supplies, and the department of highways, instead of the common council, which, prior to the passage of the act of 1897, constituted the "municipal authorities" referred to in the act of 1890.

APPEAL by the plaintiff, John F. Ghee, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 29th day of June, 1898, denying the plaintiff's motion to continue a preliminary injunction theretofore granted in the action, and vacating said injunction.

*Henry G. Atwater*, for the appellant.

*Thomas Allison*, for the respondent.

O'BRIEN, J. :

This is a taxpayer's action brought under the Laws of 1881 (Chap. 531) as amended by the Laws of 1892 (Chap. 301), and the object of it is to restrain the laying of gas mains in certain streets in New York city upon the grounds that the defendant, the Northern Union Gas Company, which is laying the mains, has no franchise or right to do so, and that certain officials of the city, the commissioner of highways and the deputy commissioner of highways of the borough of the Bronx, have illegally granted the permit for the laying of said mains and are aiding and assisting the gas company in laying them without authority of law.

The theory upon which the complaint is drawn is that the gas company has not and never had power to carry on its business outside of the limits of the village of Williamsbridge; but it appeared upon the motion for the injunction by the opposing affidavits that



the defendant, the Northern Union Gas Company, was organized in September, 1897, for the purpose of manufacturing and supplying gas and electricity for public and private buildings in the city of New York, and that it purchased from the Northern Gas Light Company, a distinct and separate corporation, organized before the year 1895, gas mains, supply pipes and the privilege of supplying gas in the twenty-fourth ward of the city of New York. This necessitated a shifting on the part of the plaintiff to the position that the new company, though incorporated with the right to lay gas mains anywhere within the city, "with the consent of the municipal authorities," had never obtained such consent.

There is thus presented upon this appeal, as there was in the court below, two questions for determination, the first whether the plaintiff could maintain a taxpayer's action to obtain the relief sought, and in that connection whether the complaint was sufficient, and the second whether the permits granted by the department of public buildings, lighting and supplies, and by the department of highways, was the consent of the municipal authorities, or whether the consent of the municipal assembly, as the successor of the old board of aldermen, was required.

The first question, that of the right of a taxpayer to bring such action and what the complaint should allege, has been lately determined by this court in the case of *Sheehy v. McMillan* (26 App. Div. 140), which decision renders further discussion unnecessary, it being sufficient to say that, if the facts had been made to appear as alleged in the complaint, there might be a good foundation for the action. Upon the motion below, however, it was made to appear that the plaintiff had not proved such facts so far as the defendant, the Northern Union Gas Company, is concerned, and, as a result, he was compelled to change the theory upon which the complaint was framed, namely, that such company, by its articles of incorporation, was confined in its business operations within the limits of the village of Williamsbridge. In *Sheehy v. McMillan* (*supra*) it was held that "If the complaint does not state a cause of action, then it necessarily follows that the plaintiff was not entitled to the order appealed from. Before he could obtain an order of this character he was required to show, by his complaint, that he had a good cause of action, and was entitled to a judgment against the

defendants. (Code Civ. Proc. § 603.) The cause of action attempted to be alleged in the complaint cannot be perfected, for the purpose of sustaining the order by the aid of the other papers used on the motion." Though we were agreed in the abstract that a good cause of action was pleaded, it now appears that the theory upon which the complaint was drawn must be abandoned. We will pass, however, without deciding the question as to the right of the plaintiff to maintain this action as a taxpayer and the sufficiency of the complaint, and turn our attention to the other question, the determination of which we regard fatal to the plaintiff's right to an injunction.

It was not disputed that the Northern Union Gas Company is the successor of the Northern Gas Light Company, and, in addition to its own corporate powers, possesses as a successor in interest of the Northern Gas Light Company such powers as that company had. The Northern Union Gas Company was incorporated in 1897 under the Transportation Corporations Act, for the purpose of engaging in the gas business anywhere within the city of New York. It subsequently made a contract with the department of public buildings lighting and supplies of the city to light certain streets in the twenty-fourth ward, where the streets in question are situated, and one of the provisions of the contract stated that the gas company should have the right to lay pipes between certain dates in any of the streets in that ward upon applying to the commissioner of highways for a permit to open the streets. Upon application made, this permit was duly issued, authorizing the gas company to remove the pavements and the surface of the streets for the purpose of laying down mains.

The plaintiff, though not disputing these facts, contends that such permits do not constitute the consent of the municipal authorities as required by the Transportation Corporations Act. In other words, the plaintiff's contention is that "the consent of the municipal authorities," as required by the act, referred to the municipal assembly, and not to the heads of the departments named. In support of this contention, that without the special permission of the local legislative board the disturbance of the surface of the streets for the purpose of laying gas mains was illegal and unauthorized, we are referred to many authorities which have construed the term

“municipal authorities” to be synonymous with, and to mean, the body having the right to legislate locally on the subject, such as boards of supervisors and boards of aldermen, as constituted in cities and counties throughout the State, and the board of aldermen, as it was constituted in the old city of New York prior to the consolidation of the different communities into the greater city. Although the cases referred to are undoubted authorities for the proposition contended for, they do not particularly aid us in the disposition of the question presented for our consideration, for it must be remembered that the Legislature, having control over the streets, could provide what body or department should be vested with the authority to regulate their use, and could designate who should constitute the local authority whose consent must be first obtained.

As we are dealing here with the wording and construction of statutes, we are compelled, even at the risk of unduly extending this opinion, in view of the novelty and importance of the questions presented, to set forth some of them at length. The Transportation Corporations Act (Laws of 1890, chap. 566, § 61) provides as follows: “Every such corporation shall have the following additional powers: 1. If incorporated for the purpose of supplying gas for light, to manufacture, sell and furnish such quantities of gas as may be required in the city, town or village where the same shall be located, \* \* \* for lighting the streets and public or private buildings or for other purposes; and to lay conductors for conducting gas through the streets, lanes, alleys, squares and highways, in such city, villages or towns, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe; and such municipal authorities shall have power to exempt any such corporation from taxation on their personal property for a period not exceeding three years from the organization of the corporation.”

The position of the gas company is that, having been incorporated under the law, it is authorized to lay gas mains in the city of New York “with the consent of the municipal authorities thereof,” and that it has obtained that consent by procuring a contract with the department of buildings, lighting and supplies, and a permit from the commissioner of highways. The plaintiff, on the other hand, contends that the municipal authorities referred to in the act are the

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legislative body of the city, town or village in which the gas mains are to be laid, and that in the city of New York the municipal authorities, since the new charter (Laws of 1897, chap. 378), are the municipal assembly, and prior thereto were the common council. That the last proposition is true, namely, that prior to the charter the common council constituted the municipal authorities, has been decided too frequently to be questioned. But under the new charter an entirely new question is presented, which is whether the municipal authorities referred to in the Transportation Corporations Act are the commissioner of highways alone, or such commissioner in connection with the commissioners of building, lighting and supplies, or the municipal assembly. That a radical change has been effected by the new charter in the distribution of the powers and functions of the corporation of the city is self-evident, and it goes without argument that the Legislature of the State, in the exercise of its sovereign power, could change existing laws and substitute entirely new provisions affecting the rights, powers and duties of the municipality. Thus, it could take away from the common council or municipal assembly all power over the streets and confer that power upon some other local body or officer. The question remains whether it has done so.

We are now brought to a consideration of the various provisions of the charter relating to the subject of streets, and the division of the powers to be exercised by the different bodies or departments in reference thereto. In that connection we should remember the principle referred to in the introduction to the charter by the commissioners who drafted it, namely, "The established rule of law which prescribes that a charter granted to a municipal corporation must be construed so strictly that nothing may pass by bare inference, but every substantial power must be found in the express terms of the grant."

Coming then to the power conferred on the municipal assembly over streets in general, and more particularly in reference to their use in the laying of gas mains, we find by section 46 that "Except as otherwise provided in this act, all the powers and duties conferred or charged upon the common council or the mayor, aldermen and commonalty of the city of New York, or the board of aldermen thereof \* \* \* shall be exercised and performed by the munici-

pal assembly." By section 45, "The municipal assembly is authorized to grant \* \* \* the franchise or right to construct and operate railways \* \* \* and to maintain and regulate ferries," but we fail to find the power conferred to grant any franchise to a gas company, or to consent to the use of the streets thereof expressly conferred upon the municipal assembly. Indeed, neither the city nor any of its officers has the power to grant a franchise to carry on the business of supplying gas by means of pipes in the streets, that power not having been conferred, but being still vested in the Legislature. The distinction between a grant of a franchise and the consent of a municipal authority must not be confused, although much of the argument of the plaintiff fails to note such distinction. As well expressed by Mr. Justice BARRETT in *Abraham v. Meyers* (29 Abb. N. C. 384), "The franchise proceeds from the State, and the consent of the local authorities is simply to a form of street use." (*City of Brooklyn v. Jourdan*, 7 Abb. N. C. 23.)

The Legislature can, of course, confer the right upon a municipal corporation, not alone to give a consent, but also to grant a franchise, as is well exemplified by section 45 of the charter to which we have referred, where such power is conferred upon the municipal assembly with respect to railways and ferries. No such power is anywhere given in the charter to the municipal assembly to grant franchises to gas companies. In addition to the special authority given for certain specified purposes, none of which relate to gas companies, we find by section 49 (Subd. 4) of the charter the power conferred upon the municipal assembly "to regulate by general ordinance, the opening of street surfaces for purposes authorized by law."

We must look further, therefore, and see if the charter specially confers on any local authority jurisdiction over the subject of gas companies. The charter further enacts by section 416: "It shall be the duty of the board of public improvements to prepare and to recommend to the municipal assembly all ordinances and resolutions regulating the following matters:" (Subd. 2) "The regulating \* \* \* of streets \* \* \* and the making of all excavations therein for public purposes;" and by subdivision 10, "The laying of gas pipes and electric wires underground, \* \* \* and the lighting of all public thoroughfares \* \* \* and the opening of street surfaces

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for the business of manufacturing, using and selling electricity, gas, steam." It will thus be seen that the board of public improvements is charged with the duty of recommending to the municipal assembly ordinances and resolutions regulating, among other things, the laying of gas pipes and electric wires under ground; and the latter body is empowered to regulate by general ordinance the opening of street surfaces for purposes authorized by law. Such general powers thus conferred are in no way inconsistent with, but are to be exercised in connection with, the powers and duties conferred on the separate departments by the charter. And in reference to the department having the right to grant permits to use the streets for gas purposes, we find by section 573 that it was enacted: "The commissioner of the department of public buildings, lighting and supplies shall have cognizance and control of" (Subd. 2) "the making and performance of contracts when duly authorized in accord with the provisions of this act, and for the execution of the same in the matter of furnishing the city, or any part thereof, with gas, \* \* \* and of the use and transmission of gas \* \* \* for all purposes in, upon, across, over and under all streets, roads, avenues, parks, public places and public buildings; \* \* \* and the granting of the permission to open streets, when approved by the department of highways." By said charter, section 525, it is enacted as follows: "No removal of the pavement or disturbance of the surface of any street for the purpose of \* \* \* laying down gas and water pipes \* \* \* or introducing the same into buildings, or for any purpose whatever, shall be made until a permit is first had from the department of highways."

Reading these provisions together, it is difficult to avoid the conclusion that the "municipal authorities" whose consent is necessary for the laying of gas mains in the streets are the department of public buildings, lighting and supplies, and the department of highways. This is an undoubted departure from the plan or scheme under which the old government of the city was conducted, for therein the local authorities to which reference is made in nearly all prior legislative acts were the municipal council or board of aldermen. By the charter scheme, the new legislative body has special powers and duties conferred upon it, and the right is given to enact general ordinances affecting subjects which are specially confided to distinct and separate departments of the city govern-

ment. The purpose thus evidenced is, clearly, to separate the legislative from the executive department and to confer upon the latter the power necessary to execute the work devolving upon each department, subject only to the right of the legislating body to enact general ordinances as to the mode of exercising such power.

In reaching the conclusion that the consent of the commissioners referred to, is the consent of the proper municipal authorities required by the Transportation Corporations Law, we have not overlooked the provision in that act which gives the power to the local authorities to exempt the gas company from taxation for a limited time, nor the force of the argument based thereon, that as the municipal assembly could alone exempt gas companies from taxation, therefore, that body constitutes the municipal authorities whose consent is required. When the Transportation Corporations Law became a law, the municipal authorities therein referred to were undoubtedly the local legislative body in any city, town or village, and in addition to granting a consent, had the right to exempt such companies from taxation. Now, however, by the charter, as stated, a radical departure has been made in the distribution of the powers and functions of government, and we are not to be controlled in our construction of the new charter solely by an argument based upon the fact that formerly the same body was vested with the double right of granting consent and of exempting from taxation. Such an argument assumes that the existence of the language of the Transportation Corporations Law renders it impossible for the Legislature to enact that the one power may not be exercised by one municipal authority and the other power by another municipal authority.

We deem it unnecessary to discuss the other questions presented, as to what rights, if any, the respondent company acquired as the successor of the former company and by virtue of the consent and permit which it had in the twenty-fourth ward; thinking as we do, for the reasons already given, that the respondent company has by the contract made with the department of public buildings, lighting and supplies, which carried with it the permit to use the street for laying gas mains, coupled with the consent of the commissioners of highways, conformed to the provisions of the law entitling them to proceed with the work of laying mains in the street in question.

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The learned judge below was, therefore, right in refusing to enjoin the projected work, and the order appealed from should be affirmed, with costs.

BARRETT and RUMSEY, JJ., concurred ; INGRAHAM, J., concurred in result on the ground that the plaintiff cannot maintain this action as a taxpayer upon the facts as they appear.

Order affirmed, with ten dollars costs and disbursements.

CHARLES C. DICKINSON, as Assignee of EUGENE M. EARLE, Individually, for the Benefit of Creditors, and as Assignee of EUGENE M. EARLE and WILLIAM PITT EARLE, as Copartners, for the Benefit of Creditors, Appellant, v. EUGENE M. EARLE, WILLIAM PITT EARLE and MAY S. EARLE, Respondents.

*Assignee—compromise agreement made by the debtor with his creditors—appointment of the debtor as receiver of the assigned property to conduct business therein prior to the settlement of the assignee's claim for commissions.*

Where a debtor, after making an assignment for the benefit of his creditors, effects a compromise with all of them, leaving no claim outstanding against the assigned property, except that of the assignee for his commissions, the court, although it may not, prior to a settlement of such claim, direct a retransfer of the assigned property to the assignor, may, where the non-user of such property, consisting of a summer hotel, is likely to result in serious loss, and the assignee makes no attempt to carry on the hotel business therein, properly appoint the assignor a receiver of the property, which is thus retained within the custody and under the control of the court, in order that he may conduct the hotel business therein for the ensuing season, he being, by reason of his previous experience as proprietor of the hotel, a competent person to do so. VAN BRUNT, P. J., dissented.

APPEAL by the plaintiff, Charles C. Dickinson, as assignee of Eugene M. Earle, individually, for the benefit of creditors, and as assignee of Eugene M. Earle and William Pitt Earle, as copartners, for the benefit of creditors, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 10th day of May, 1898, continuing an injunction restraining the plaintiff from selling or



advertising for sale any of the assigned estate of the above-named assignors, and from in any way interfering with the defendant Eugene M. Earle in his management of that part of the assigned estate known as the "Hotel Earlington" and the "Hotel St. James" at Richfield Springs, New York.

*H. D. Luce*, for the appellant.

*Elbert Crandall*, for the respondents.

O'BRIEN, J. :

As this appeal comes before us there is presented only a question between an assignor and an assignee for the benefit of creditors. It is made to appear that a large and valuable hotel property at Richfield Springs is or is claimed to be part of the assigned estate. It is shown that all the debts of the assignors mentioned in the schedules are paid or compromised, or that the creditors have consented to the restoration of the assigned estate to the assignors. The assignee, notwithstanding that situation, declined to deliver the property to the assignors, claiming that he is entitled to retain it until his fees are paid and his accounts settled. He brought this action for the settlement of his accounts, alleging in his complaint that the assignors entered into an agreement or arrangement with their creditors, by the terms of which the creditors respectively agreed to accept one-half of their indebtedness in money and the balance by notes, in consideration of which said money and notes the said several creditors agreed to assign and transfer their said indebtedness to one of the defendants, which arrangement has been carried out and the said several creditors have either received their pay in full or have assigned their said claims to one of the defendants who now claims to own or hold the same as a charge against the assignors. It, therefore, appears by the plaintiff's own statement that so far as creditors are concerned his duties as assignee have ended. In the answer of the defendants, and in affidavits produced upon the hearing in the court below, it was shown that the assignee had advertised the hotel property for sale; but it also appears that, before this motion was made, the notice of sale was withdrawn. It further appeared that the assignee was authorized by the court to open the hotel and carry on business therein during the summer of 1897, and that a

large profit accrued therefrom. It was also shown that it was advisable to open the hotel and carry on the business through the summer of 1898. On those principal facts this motion was made by the assignors to enjoin the assignee from selling the hotel property and also to compel him to turn over and reconvey to Eugene M. Earle, one of the assignors, all of the assigned estate upon such terms and conditions as to the court might seem proper, and for the removal of the assignee from his position as such, and for further relief. The court below ordered that an injunction issue restraining the assignee from selling the property above mentioned, and further directing him to turn over, transfer and deliver all the Richfield Springs property to Eugene M. Earle, who was appointed a receiver of such property on giving security; and the assignee was directed to turn over to him also all the books and papers relating to such property or used in the conduct of the business of the hotel.

By the plaintiff's own statement in his complaint, it is shown that his trusteeship survives only for the assignors, but he cannot be compelled to surrender his legal title to the property under the assignment until his accounts are passed and his claims against the property for commissions settled and determined. The order below virtually destroys his legal title, and to that extent is wrong. But a state of facts is exhibited upon the record conclusively showing that, under the relations existing between the assignors and assignee, great waste of property and loss to the assignors would have accrued unless the court took charge of the property pending suit and allowed the business of the hotel as a summer resort to be carried on and continued during the season of 1898. The motion was made that the property be delivered into the hands of the assignors. That could not be done in such way as to prejudice the assignee's title; but as there was no application made by him to run the hotel during the summer of 1898, as no steps were taken by him to utilize the property, as no one was really interested in it but the assignors and the assignee to the extent of his commissions, and as it was necessary to protect both the assignors' interest and the title of the assignee, the device was resorted to of appointing the assignor Eugene M. Earle a receiver, directly responsible to the court, and he was to be let into the possession of the property pending the suit and to be

accountable in the proper way for his administration of it. The case was, therefore, presented, of property brought within the control of the court, and in which property, apart from the lien or claim of the assignee for commissions, no one was interested except the assignors, all the creditors secured by the assignment being satisfied or consenting to the assignor resuming possession. It is perfectly manifest that, under such circumstances, to save the loss which would result from the non-use of the property and its deterioration, it was competent for the court to appoint *some one* to conduct the hotel business which the assignee made no effort and asked no permission to carry on. It cannot be doubted that, under such circumstances, the court had power to appoint a receiver. The property was in danger, great loss was to be apprehended, and it was within the jurisdiction and control of the court. It is not a valid objection that the assignor Eugene M. Earle was made such receiver. He gave adequate security. It is in accordance with the usual practice where there is a contest between parties concerning a going business, and it has been the custom in this district in cases of litigations between copartners to appoint one of them a receiver to wind up or carry on the business. From this assignor's antecedent relations to the hotel, his experience and knowledge as a hotel proprietor, he was a proper person to appoint. But as the order appealed from was made, it was entirely too broad. The court should merely have appointed Eugene M. Earle receiver to carry on the business of the hotel for the summer of 1898, and directed that the assignee let him into possession of the property for that purpose and no other, and that he account to the assignee for his administration. The order should be modified in that regard.

Concerning the injunction, we think it was properly issued. It is clear that the assignee had undertaken to sell the property. Although he withdrew the advertisement of sale, as he says, there was nothing to prevent his readvertising it; and to guard against his so doing an injunction was proper.

The order appealed from should be modified as above suggested, and as modified affirmed, without costs.

PATTERSON, INGRAHAM and McLAUGHLIN, JJ., concurred; VAN BRUNT, P. J., dissented.

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VAN BRUNT, P. J. (dissenting):

In January, 1897, the defendants, Eugene M. Earle and William Pitt Earle, as copartners, and the said Eugene M. Earle individually, duly executed to the plaintiff, as assignee, an assignment of all their property for the benefit of creditors. The assignee duly accepted the trust and entered upon its duties. The plaintiff as such assignee acquired title to certain hotels in the village of Richfield Springs, which were incumbered by mortgages to a very considerable amount. He also, under such assignment, became the owner of the interest of the defendant Eugene M. Earle in certain real estate in the city of New York of considerable value. This was also incumbered by certain liens or assignments as security for loans made to the defendant. During the summer of 1897, the assignee, under permission of the court, opened hotels for the entertainment of guests, producing a profit over and above expenses. With the view of converting the assigned property into cash the plaintiff applied in January of this year for an order permitting the sale of all the assets of the estate, and an order was subsequently granted under which the sale of the property in this city was advertised for the 24th day of March, 1898, and of the Richfield property for the 29th of March, 1898. A compromise was thereupon effected, by which all the creditors, with the exception of five, assigned their claims to May S. Earle, the wife of Eugene M. Earle. These five and the said May S. Earle have given directions in writing to the plaintiff as assignee to reconvey all the assigned estate to said Eugene M. Earle, subject to such liens as existed thereon at the time of the execution of the general assignment. It is claimed by the defendants that, before the composition was effected, Eugene M. Earle explained to the assignee the arrangement he had in view, and the assignee approved of it, professing a willingness to restore the property as soon as it could be restored with safety. Application being made to the plaintiff he refused to reconvey the property. He, however, abandoned the sale of the property and commenced this action on or about the 5th of April, 1898, for the settlement of his accounts as assignee. The defendants put in an answer whereby they applied for an affirmative judgment removing the plaintiff as assignee, restraining him from selling any part of the assigned estate and directing the return and reconveyance of the said estate subject to such liens as are now

thereon upon such terms as the court should direct, and that the plaintiff account. The defendants thereupon moved for an injunction restraining the plaintiff from selling or advertising for sale any of the assigned property or from in any manner interfering with the property or from hindering, delaying or impeding the said Eugene M. Earle in the management and care of the assigned estate or in his proceedings to open the hotels. Upon the hearing of the injunction the motion was granted and said Eugene M. Earle was appointed receiver of the property in question.

There is nothing in the papers upon which this motion was granted which would justify the court in a removal of the assignee from his position. He was entitled to possession of the property until the final settlement of his accounts. He had brought an action for that purpose, and these amounts might have been easily and quickly settled if the defendants had shown a disposition to aid in attaining that result. The assignee had a right under his deed of assignment to retain possession of the property until by legal proceedings his accounts were settled and he was paid the amount due to him, and then only was he bound to transfer.

It is not so clearly apparent from the papers submitted upon this motion that the plaintiff has made such improper and unfounded claims against this property as would justify his being removed as assignee in this summary manner; because the appointment of a receiver under the circumstances amounts to a removal of the assignee from the position which he was entitled to hold.

It further appears that at the time of the putting in of the answer he had abandoned all idea of selling the property, and there was no necessity for the obtaining of an injunction to restrain an act which was not threatened to be committed.

It seems to me that the order was improper and should be reversed with ten dollars costs and disbursements, and the motion denied with ten dollars costs to abide the event.

Order modified as directed in the opinion and as modified affirmed, without costs.

HUGO JAECKEL, Respondent, v. THE AMERICAN CREDIT INDEMNITY  
COMPANY of New York, Appellant.

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*Credit insurance policy—notice of a loss included in the sum to be borne by the indemnified—payments made on an indebtedness after final proof of loss and within the period allowed the company to adjust the loss—obscure provision not given effect.*

In the adjustment of the amount payable under a policy of credit insurance, by the terms of which the first losses, up to a certain sum, are to be borne by the party indemnified before any claim can be made against the company, and "proof of loss must be made \* \* \* within twenty (20) days after knowledge of the insolvency of any debtor shall have been received by the indemnified, \* \* \* otherwise such claims shall be barred," the company is entitled to notice of a loss, although such loss be included in the sum which must be borne by the party indemnified, and if such notice be not given, a claim therefor cannot be considered in the settlement of the company's liability.

Under a provision of such a policy that "final proof of loss shall be forwarded to the central office of this company \* \* \* and the amount due by this company under final proof of loss shall be adjusted and paid within sixty (60) days after receipt by the company of such final proof of loss," the company is not entitled to deduct from the amount to be paid by it payments made by the debtors within the sixty days on account of indebtednesses included in such final proof of loss, especially where the policy contains a condition that "no loss can be proven after the expiration of this bond."

Where the amount of the initial loss to be borne by the indemnified is plainly fixed by one provision of the policy at a certain sum, such amount will not be increased under another condition thereof framed in obscure language and scarcely to be understood from its words.

INGRAHAM and McLAUGHLIN, JJ., dissented.

APPEAL by the defendant, The American Credit Indemnity Company of New York, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of New York on the 14th day of April, 1898, upon the report of a referee.

This action is brought upon a policy of credit insurance, which guarantees "the said Indemnified against loss to the extent of and not exceeding Fifteen thousand dollars resulting from insolvency of debtors over and above a net loss of \$3,750, Thirty-seven hundred fifty dollars, first to be borne by the said Indemnified on total gross sales and deliveries of goods, wares or merchandise amounting to

\$1,000,000 or less, said sales and deliveries to be made \* \* \* between the first day of July, 1893, and the thirtieth day of June, 1894, both days inclusive." The premium was paid by the plaintiff on July 21, 1893. The policy expired June 30, 1894, and proof of loss was sent July thirty-first. The policy provided that the company is allowed sixty days thereafter in which to investigate claims and to make adjustment. The sum for which suit was brought was \$2,874.39, obtained by adding losses incurred as follows: By failure of McNamara Dry Goods Company, \$691.20; of Lally & Collins, \$1,212.72; of Conrad & Sons, \$642.40; of Abel & Sons, \$683.73; and of Knable & Cooper, \$3,394.34; and by deducting therefrom the initial loss of \$3,750 to be borne by the indemnified,

The referee disallowed the claim by failure of McNamara Dry Goods Company because, although the policy dates from July first, this loss occurred July eighteenth, before the premium was paid on July twenty-first, and a condition of the policy requires payment of premium before any loss can be considered. The referee further deducted \$61.86, an amount paid by Knable & Cooper subsequent to their failure, which amount, by condition 12b of the policy, should be credited to the defendant as salvage on claims exceeding those which made up the initial loss. Lastly, the referee deducted \$217.34, an amount paid by Lally & Collins subsequent to their failure, but before the policy had expired. He thus rendered a decision for \$1,903.99 in favor of the plaintiff.

With regard to the claim of Lally & Collins, it appears that condition 4 of the policy requires a notice of loss to be sent to the company within twenty days after knowledge thereof, and that the plaintiff received knowledge of the failure of that firm on November twenty-seventh, but sent no notice until December twenty-first. The referee held that, as this loss was part of the initial loss to be borne by the plaintiff, the condition requiring twenty days' notice did not apply to it. In considering the claim made for loss by failure of Abel & Sons, the referee made no deduction for a payment of \$373.63 made September twelfth, after final proof of loss had been sent, but before final adjustment by the defendant, holding that the claims against the defendant accrued June thirtieth, and that its liability must be determined by the conditions existing when the final proofs of loss were submitted, namely, on July thirty-first.

The referee also held that no deduction should be made for payments subsequently received from Abel & Sons and from Conrad & Sons, on the ground that the defendant's liability had become fixed, and that, as the loss arising from the failure of these firms was a part of the initial loss, such subsequent payments belonged to the plaintiff. In arriving at his conclusions, the referee discarded as obscure and unintelligible condition 12a of the policy, by which the defendant claimed that the initial loss of the indemnified, stated in the policy at \$3,750, was increased to \$5,000.

From the judgment entered on the referee's decision the defendant appeals.

*John Vernou Bouvier, Jr.*, for the appellant.

*Benjamin N. Cardozo*, for the respondent.

O'BRIEN, J. :

This appeal is brought upon disputed construction and interpretation of the conditions of the policy, and not upon disputed facts.

The first construction called for is as to condition 4 of the policy, which states: "Proof of loss must be made \* \* \* within twenty (20) days after knowledge of the insolvency of any debtor shall have been received by the Indemnified \* \* \* otherwise such claims shall be barred." The appellant holds that, as such notice was not given of the failure of Lally & Collins, the loss thereby incurred should be excluded from consideration in the settlement of liability. The respondent, although admitting the force of this contention, insists that this particular loss should not be included under this condition because of another condition in the policy. The other condition referred to is, that the first losses up to a certain sum should be borne by the indemnified before any claim could be made against the company. The respondent's position, allowed by the referee, is, therefore, that the loss by failure of Lally & Collins, being a first loss and less in amount than the initial loss agreed to be borne by the indemnified, was not a "claim" against the company, nor a "loss" for which the company was liable, and, therefore, is not included under condition 4 requiring notice of loss to be sent within twenty days. We are unable to agree with this holding of



the referee, for the reason that, as this loss had to be taken into consideration in the final settlement, the company was entitled by its agreement to learn of it, as well as of all other losses within the time stipulated. Such seems to be the fair and reasonable construction and the one in accord with the spirit of the agreement. Otherwise, the company could not insist upon knowledge of the failures making up the initial loss to be borne by the indemnified excepting as they were subsequently proved as facts on the final settlement. This construction would shut off the company from proper and timely inquiry into the failures and losses presented, and would open the door to fraud on the part of the indemnified. There is nothing, moreover, in the language quoted from condition 4, or in any other part of the policy excluding from the time limitation losses or claims going to make up the initial loss. We think, therefore, that the company was entitled to receive the stipulated notice of the loss by the failure of Lally & Collins, as of all other losses, and it follows that if such notice was not given, this claim should be excluded in the settlement of the defendant's liability.

A second question of construction is presented by the contention of the appellant that the payment by Abel & Sons of \$373.63 made September twelfth, should be deducted from its liability because of condition 12c of the policy, which states: "Final proof of loss shall be forwarded to the central office of this company, \* \* \* and the amount due by this company under final proof of loss shall be adjusted and paid within (60) sixty days after receipt by the company of such final proof of loss." The defendant contends that the final proof of loss being sent July thirty-first, and sixty days thereafter being allowed to adjust the same, a payment made September twelfth, before such adjustment, should be deducted. This contention cannot be sustained; for, as stated by the referee, the claim against the company had accrued, and we must hold that the sixty days for adjustment was given, as indicated by the company's letter of August second, to give time "to investigate claims" filed, and not to give time for further payments to be made and thus better the condition of the company. If, as the defendant claims, this payment should be deducted from the liability, the company could have demanded sixty days after final proof of its payment was accepted and in this way delayed final settlement.

It was, moreover, provided by condition 8 in the policy that "no loss can be proven after the expiration of this bond," and the defendant may not on the one hand receive benefit from subsequent payments and on the other suffer no increase of liability for losses during the period granted for adjustment. We must hold, therefore, that the referee was right in not deducting this payment.

The most serious question of construction arises on this appeal as to the agreement made regarding the exact amount of initial loss to be borne by the indemnified, the appellant contending that it should be greater than the \$3,750 admitted by the referee. Subsidiary to this determination, and depending upon it, is the question of what understanding existed regarding salvage in the insolvent claims. It is stated in the policy that \$3,750 is the initial loss to be borne by the indemnified, and, by a further condition, that claims going to make up such loss shall belong to the indemnified. This latter condition is 12b, which states: "When claims shall be allowed by this company beyond the amount agreed to be borne by the indemnified, such claims shall at once be transferred to this company, and this company shall become the owner thereof to the extent of the amount paid on such claims; provided, however, that where the indemnified has a part interest in any one of such claims, the amounts realized therefrom, less cost of collection, shall be divided *pro rata* as the interest of each may appear." The defendant, however, alleged that there was an agreement, namely, condition 12a of the policy, by which the company relinquished its right to salvage in claims on condition that the initial loss to be borne by the indemnified should be \$5,000 instead of \$3,750. This condition was discarded by the referee as obscure and unintelligible, and the case of *American Credit Indemnity Co. v. Wood* (73 Fed. Rep. 81) was cited in support of his ruling. The condition discarded by the referee and brought before us on this appeal states: "To simplify adjustment and to avoid disputes it is agreed that such sum of gross loss shall be the limit to be borne by the indemnified, as less 25 per cent will equal the agreed amount of annual net loss, all claims making up such said sum of gross loss to remain the property of the indemnified, the company relinquishing its claims except as hereinbefore provided."

If this condition (12a) be disregarded, then the referee is right in giving the plaintiff salvage in claims making up the initial loss in accordance with condition 12b. It is admitted that condition 12a is framed in obscure language, but it is claimed to be an agreement that the claims shall be retained by the indemnified, the company relinquishing the title thereto on condition that a certain limit of loss different from that previously stated in the policy shall be borne by the indemnified. The manner by which this limit is to be calculated is scarcely to be understood from the words "such sum of gross loss shall be the limit to be borne by the indemnified, as less 25 per cent will equal the agreed amount of annual net loss," and *prima facie* the language is not intelligible. The only aid given to its construction is to be found in the "agreed statement of facts" in the record, where it is stated: "It is agreed that, mathematically considered, \$5,000 is the 'sum of gross loss' mentioned in condition 12a, 'as less twenty-five per cent will equal the agreed amount of annual net loss.'" If we substitute in condition 12a, as here indicated, it will read, "it is agreed that \$5,000 shall be the limit to be borne by the Indemnified, as less 25 per cent will equal the agreed amount of annual net loss; all claims making up such said \$5,000 to remain the property of the Indemnified." This substitution does not clear the condition of ambiguity. In the condition, the words "sum of gross loss" seem to be used, *first*, in the sense of limit to be borne by the indemnified; and, *secondly*, in the sense of total loss. We are unable to determine whether the condition was intended to give salvage to the plaintiff on all claims or only on a part of them. We cannot assume that, in consideration of having salvage in claims amounting only to \$5,000, the indemnified intended to increase his initial loss to that sum, as the supplemented condition would indicate, nor, on the other hand, can we say that the sum of total loss is agreed to be \$5,000, for the determination of total loss is in issue on this appeal. We, therefore, hold that the condition is not sufficiently certain to be applied and should be disregarded. The company being charged with the duty should make the conditions reasonably certain and clear, and it would be unjust and inequitable to permit it to receive the most favorable construction of a blind and obscure condition.

This view is clearly expressed in the case of *American Credit*

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*Indemnity Co. v. Wood* (73 Fed. Rep. 88) where the learned judge, referring to this condition 12a, says: "If, by the introduction of a subsequent and obscure clause, difficult to understand, or requiring expert knowledge for its comprehension, the preceding clauses, plainly and unequivocally expressed, by which the initial loss of the indemnified is fixed, are nullified, the subsequent clause must be ignored. It cannot be permitted to operate as a snare to the unwary." In the present case there was a clear understanding of an initial liability of \$3,750; and the condition 12a is not clear, even with the substitution of "\$5,000" for the words "sum of gross loss." There remains an uncertainty as to the real intent and meaning of the condition, and it cannot, therefore, be permitted to operate to change the clearly-stated initial loss to the injury of the indemnified. If, in fact, we adopt the defendant's interpretation of this condition it only grants the indemnified an option to increase his initial liability. But no facts are made to appear which show that the plaintiff chose to exercise such an option, and, therefore, the defendant has no ground for contending that the condition should be taken into consideration.

The referee was, therefore, right in following the terms of condition 12b in disposing of payments made by creditors subsequent to their failure and after the expiration of the policy.

It follows, from the construction thus given to the several conditions of the policy, that the judgment confirming the referee's report should be modified by striking out the claim of Lally & Collins, amounting to \$995.38, leaving \$908.61, with interest from October 1, 1894, and costs in the court below, due from the defendant. As so modified, the judgment should be affirmed, without costs of this appeal.

VAN BRUNT, P. J., and PATTERSON, J., concurred; INGRAHAM and McLAUGHLIN, JJ., dissented.

INGRAHAM, J. (dissenting):

I concur with Mr. Justice O'BRIEN as to the disposition made of the claim against the defendant on account of the loss by the failure of Lally & Collins, but I do not agree that the clause 12a annexed to the policy is so uncertain as to its real intent that it cannot operate as a term of the policy. By the policy the defendant agreed to

indemnify the plaintiff against loss "to the extent of and not exceeding fifteen thousand dollars, resulting from insolvency of debtors, over and above a net loss of \$3750, thirty-seven hundred fifty dollars, first to be borne by the said Indemnified." By clause 12a, which by the terms of the policy itself was made a part of the contract as fully as if it were recited at length therein, it is provided: "To simplify adjustment and to avoid disputes, it is agreed that such sum of gross loss shall be the limit to be borne by the Indemnified, as less 25 per cent will equal the agreed amount of annual net loss." It is admitted in the agreed statement of facts that the sum of \$5,000, less twenty-five per cent, will equal the agreed amount of annual net loss, viz., \$3,750. In order to provide a method by which such net loss could be ascertained, it was agreed that a gross loss of \$5,000 would produce a net loss of \$3,750, or, in other words, that by the agreement in the case of debtors owing \$5,000, an amount should be fixed which would result in a net loss to the creditor of \$3,750, and there should, therefore, be no claim against the defendant until there was a gross loss of \$5,000; it being assumed that where debtors of the insured failed, owing \$5,000, the insured would receive as dividends or part payment of such \$5,000 indebtedness twenty-five per cent, and that to enable the insured to obtain that sum of twenty-five per cent it was agreed that the claim going to make up this sum of \$5,000 should not pass to the defendant, but should remain the property of the insured who would be entitled to receive any dividend or payments made thereon. I fail to see where there is any difficulty in construing this condition annexed to the policy. Where a loss is incurred in consequence of the failure of a debtor, the gross loss would be the amount owing by the debtor at the time of the failure. The net loss would be the amount that the creditor would lose after all dividends upon the debtor's estate, or all partial payments that would be received by the creditor on account of the indebtedness after the failure. It was the net loss of \$3,750 that the assured was to sustain before there was a liability under the policy, and in order to ascertain what that net loss should be the parties agreed that it was to be considered that the gross loss or the amount that the debtor owed when he failed would be reduced by twenty-five per cent by dividends received from the debtor's estate. The parties have made their contract, which seems to me

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to be reasonably clear and capable of enforcement, and I can see no reason why it should not be enforced. I think, therefore, that the defendant was liable only where the loss sustained by the plaintiff by the failure of his debtors exceeded the gross sum of \$5,000, and as there is no evidence that such a gross sum was exceeded, the defendant was entitled to judgment. For that reason I think the judgment should be reversed.

MCLAUGHLIN, J., concurred.

Judgment modified as directed in opinion and as modified affirmed, without costs of appeal.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GEORGE WALTON GREEN, Relator, v. ROBERT A. VAN WYCK, Mayor of the City of New York, Respondent.

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159a 509

*Greater New York charter — right of the mayor to remove an aqueduct commissioner — it is not affected by section 518 of the charter.*

Under section 95 of the charter of Greater New York (Chap. 878 of the Laws of 1897), which by section 1608 thereof is made a continuation of section 1 of chapter 11 of the Laws of 1895, an aqueduct commissioner, appointed under the provisions of section 1 of chapter 490 of the Laws of 1883, as amended by section 1 of chapter 584 of the Laws of 1888, may be removed by the mayor at pleasure within six months after the commencement of the mayor's term of office, and the right of the mayor to exercise this power is not affected by section 518 of the charter, providing that "the term of office of the commission appointed and existing under the aforesaid act shall cease and determine on the first day of January, nineteen hundred and one," as such latter act relates to "the term of office of the commission" and not to the term of office of the individual commissioners.

CERTIORARI issued out of the Supreme Court and attested on the 26th day of April, 1898, directed to Robert A. Van Wyck, mayor of the city of New York, commanding him to certify and return to the office of the clerk of the county of New York all and singular his proceedings in relation to the removal of the relator, George Walton Green, from his office of aqueduct commissioner of the city of New York.

*Elihu Root*, for the relator.

*Theodore Connolly*, for the respondent.

INGRAHAM, J. :

The relator was appointed one of the aqueduct commissioners in pursuance of the provisions of section 1 of chapter 490 of the Laws of 1883, as amended by section 1 of chapter 584 of the Laws of 1888. It is therein provided that the mayor, the comptroller and the commissioner of public works of the city of New York, and four competent persons who shall be appointed within ten days after the passage of this act by the mayor of the city of New York, "are hereby authorized, empowered and directed to carry out the provisions of this act, in the manner hereinafter provided, for the purpose of supplying said city with an increased supply of pure and wholesome water. They shall be known as the Aqueduct Commissioners." By section 37 of the said act, as amended by section 2 of chapter 584 of the Laws of 1888, it is provided that "If any of said Aqueduct Commissioners, other than those named by the titles of their respective offices, shall resign, die, or become legally disqualified or be removed the vacancy, so caused, shall be filled by appointment by the mayor of the city of New York. \* \* \*

Any of said Aqueduct Commissioners appointed by the mayor, or his or their successor or successors, may be removed by the mayor, subject to the approval of the Governor, in the manner provided for the removal of heads of departments of the government of the city of New York by chapter four hundred and ten of the laws of eighteen hundred and eighty-two." Section 108 of the Consolidation Act (Chap. 410, Laws of 1882) prescribes the manner in which the heads of the departments of the city of New York may be removed, limits the power of removal by the mayor to a removal for cause, and after opportunity to be heard, and makes such removal subject to the approval of the Governor.

The relator was appointed an aqueduct commissioner on February 14, 1895, by the mayor of the city of New York, to fill a vacancy caused by the resignation of Francis M. Scott, who was originally appointed under section 1 of the act of 1888 before cited. On the 1st day of January, 1898, the respondent, the present mayor of the city of New York, removed the relator from the said office of

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aqueduct commissioner without preferring charges against him or giving him an opportunity to be heard, and without the approval of the Governor. The relator claims that such removal by the mayor was illegal, and in violation of the act of 1883 as amended.

By section 1 of chapter 11 of the Laws of 1895, it was provided that, at any time within six months after the commencement of his term, the mayor of the city of New York, elected for a full term, may, at pleasure, remove from office any public officer now or thereafter holding office by appointment from the mayor of said city, except judicial officers for whose removal other provision was made by the Constitution; and by section 3 of the act it was provided that all acts or parts of acts inconsistent with the act were thereby repealed. This relator was a public officer holding office by appointment from the mayor of the city of New York. Whether he was an officer of the municipality, or one upon whom duties other than those relating to the municipality conferred upon him by the State were devolved, he held office by appointment from the mayor of the city of New York. He was subject to removal by the mayor at pleasure, within six months after the commencement of the mayor's term of office, and the provisions of the act of 1883, and the acts amendatory thereof which were inconsistent with this power of the mayor to remove at pleasure within six months after the commencement of his term, were repealed by the act of 1895. Thus, when the charter (Laws 1897, chap. 378) took effect, this act of 1883 and the several acts amending it were subject to the provisions of chapter 11 of the Laws of 1895, and neither the act of 1883 nor the act of 1895, which together provided for the appointment and removal of the relator, were repealed or in anywise affected by the provisions of the charter, but the said act and its amendment, and the act modifying it, were to remain in full force and effect. The act of 1895 being in force at the time the charter took effect, was in substance re-enacted by section 95 of the charter. It is there provided that, "At any time within six months after the commencement of his term of office *the mayor*, elected for a full term, *may*, whenever in his judgment the public interests shall so require, *remove from office any public officer holding office by appointment from the mayor*," with certain exceptions, none of which applied to the office held by the relator; and by section 1608 it is provided



that, "So far as the provisions of this act are the same in terms or in substance and effect as the provisions of the said consolidation act, or of other acts of the Legislature now in force relating to or affecting the municipal and public corporations, or any of them herein united and consolidated, this act is intended to be not a new enactment, but a continuation of the said consolidation act of eighteen hundred and eighty-two, and said other acts, and is intended to apply the provisions thereof as herein modified to The City of New York as herein constituted, and this act shall accordingly be so construed and applied." By virtue of this provision in section 1608, section 95 of the charter was a continuation of chapter 11 of the Laws of 1895; and this section continued the power of removal as to all officers who held office under appointment of the mayor of the city of New York. Thus, the power to remove all such officers was continued in the mayor of the new city, so that within six months after the commencement of his term of office the mayor had the power to remove the relator whenever in his judgment the public interests required; and after the expiration of the six months had power to remove for cause, upon charges being preferred and after an opportunity to be heard, subject to the approval of the Governor; and when section 518 of the charter took effect it was the act of 1883 as it existed upon the 1st day of January, 1895, which was continued, and the charter was subject to the provisions of the act of 1895, and the act amending it and to the power given by the act of 1895 to the mayor, continued by section 95 of the charter. The provision of section 518 of the charter, providing that "*The term of office of the commission appointed and existing under the aforesaid act shall cease and determine on the first day of January, nineteen hundred and one,*" does not affect the power of the mayor given by section 1 of the act of 1895 and section 95 of the charter, to remove any one of the commissioners within six months after the commencement of his term. The language used is "the term of office of the commission," and not the term of office of the individual commissioners. It was a provision that upon a date fixed the commission itself should be abolished, and it did not relate to the appointment or removal of the individual commissioners, or limit the power of the mayor expressly conferred by the act of 1895 and section 95 of the new charter, to remove the commissioners. The language used in section 95 is very broad, including every

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public officer holding office by appointment from the mayor, with the exception of the members of the school boards and judicial officers; and we do not think that the Legislature intended to restrict, by another section, this duty, imposed upon the mayor, which did not in terms refer to the appointment or removal of officers. As was said by Mr. Justice CULLEN, in delivering the opinion of this court in the second department, in *People ex rel. Baird v. Nixon* (32 App. Div. 513): "It, therefore, follows that the relators fell within the words of the statute, and that the mayor was authorized to remove them unless it can be established that, by fair intendment, this legislation was not meant to cover their cases. The language being comprehensive, the burden is on those who assert the exception to prove it."

Counsel for the corporation also takes the objection to this writ that it will not lie, as the object of the proceeding is to try the title to an office, and that the incumbents cannot be deprived of their office without their day in court. As, however, we have come to the conclusion that the mayor had power to remove the relator, it is not necessary to pass upon this point.

For the reasons given, we think the proceeding should be affirmed and the writ dismissed, with costs.

VAN BRUNT, P. J., BARRETT and McLAUGHLIN, JJ., concurred; RUMSEY, J., dissented.

Proceeding affirmed and writ dismissed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. GORDON MACDONALD, Respondent, v. LOUIS LEUBISCHER, Appellant.

CLARENCE H. VENNER, Appellant.

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*A commissioner appointed by the court of a foreign State has no power to commit a recalcitrant witness to jail in the State of New York — power of the Legislature.*

A mandate issued under section 920 of the Code of Civil Procedure by a notary public of the State of New York, appointed under the laws of another State a commissioner to take the testimony of a witness residing in the State of New York in an action pending in such other State, which recites that certain pertinent and proper questions were propounded to the witness and that the wit-

ness refused and continues to refuse to answer each and every of said questions, but does not in terms adjudge the witness guilty of contempt, and which commands the city marshal to place the witness in the custody of the sheriff and directs the sheriff to receive him into his custody and to confine him in the county jail "until he shall submit to answer the said questions and each thereof, so put to him by counsel for plaintiffs in said action, or is otherwise discharged according to law," does not constitute due process of law and is void.

The Legislature of the State of New York has no power to confer upon an individual, who has no judicial power vested in him either by the Constitution or the Legislature of that State, and is not connected in any way with any of the courts or bodies thereof in whom the judicial power is vested, the authority to issue a process by which a person may be deprived of his liberty or his property. BARRETT, J., dissented.

APPEAL by the defendant, Louis Leubischer, and Clarence H. Venner, the party at whose instance the relator was arrested, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 12th day of May, 1898, discharging the relator from custody.

*John W. Hutchinson, Jr., and George H. Yeaman*, for the appellants.

*David McClure and William Jay*, for the respondent.

*William V. Rowe* submits a brief for the respondent.

INGRAHAM, J.:

The relator, being in custody of the respondent, a marshal of the city of New York, presented his petition to the Supreme Court, alleging that his imprisonment or restraint is by virtue of a certain paper writing, purporting to be a mandate signed by one Edward J. McCabe, commissioner and notary public, and that said McCabe, as such commissioner and notary public, possesses no power or authority whatever under or by virtue of any valid statute, or other law of the State of New York, to issue a mandate in the nature of that annexed to the petition, and he prayed for a writ of habeas corpus to inquire into the cause of his imprisonment. By the return of the marshal it appeared that the relator was arrested and is detained by virtue of a writ to him directed, a copy of which is annexed to the return. This writ is entitled

"In the Matter of the Commission to take the Deposition of Gordon MacDonald and others, issued to Edward J. McCabe, a notary public in and for the county and city of New York, on the 26th day of March, 1898, by the District Court of Arapahoe county, Colorado, in a certain action therein pending" between Clarence H. H. Venner and others and the Denver Union Water Company and others. It is issued in the name of the People of the State of New York and directed to the respondent Louis Leubischer, as marshal of the city of New York, and to the sheriff of the county of New York, and recites that the person granting the mandate, a notary public of the State of New York, in and for the county of New York, on the 26th day of March, 1898, by a commission duly issued out of and under the seal of the District Court of Arapahoe county, Colorado, appointed a commissioner in a certain action therein pending, wherein Clarence H. Venner and others are plaintiffs, and the Denver Union Water Company and others are defendants, to take the depositions of Gordon MacDonald and others, witnesses in said commission named, on behalf of the plaintiffs in said action; that on the 4th day of April, 1894, a subpoena was duly signed or issued by the Hon. JOHN J. FREEDMAN, one of the justices of the Supreme Court of the State of New York, directed to the said Gordon MacDonald, commanding him to appear before the said Edward J. McCabe, as such commissioner, on the 11th day of April, 1898, to be examined and give his deposition at the instance of the plaintiffs in said cause, which said subpoena was duly served upon said Gordon MacDonald. That in obedience to said subpoena the said Gordon MacDonald attended before the said commissioner and was by him duly sworn as a witness in said cause, in the form prescribed by law, and in obedience to said subpoena and the direction of said commissioner, attended before said commissioner from day to day thereafter and on this day; that certain pertinent and proper questions were propounded to said witness by counsel for the plaintiffs in said cause as follows, to wit: "Then follows a statement of various questions asked of the said witness; that said MacDonald refused, "and on this day continues to refuse, to answer each and every said question hereinbefore set forth without giving any reason or excuse for such refusal, except that he was advised by his counsel not to answer the same, and that the facts

sought to be elicited by said questions related to matters of trust committed to the Continental Trust Company of the city of New York, of which it is an officer ;” and that said Clarence H. Venner, one of the plaintiffs in said action, at whose instance the said Gordon MacDonald attended as such witness, made oath that the testimony of said witness in answer to the questions so propounded was so far material that without it the plaintiffs in said cause could not safely proceed with the trial thereof. The mandate then directed and commanded the said marshal forthwith to convey the said Gordon MacDonald into the custody of the said sheriff, and the said sheriff was thereby required to receive the said Gordon MacDonald into his custody in the jail of New York county and him there safely keep and closely confine until he shall submit to answer the said questions and each thereof, so put to him by counsel for plaintiffs in said action, or is otherwise discharged according to law and was signed.

“ Given under my hand as commissioner and notary public afore-said, this 26th day of April, 1898.

“ EDWARD J. McCABE,

*Commissioner and Notary Public.*”

There is annexed to said warrant a copy of a commission issued in the name of “ The People of the State of Colorado to Edward J. McCabe, Notary Public in and for the County and State of New York, greeting,” which recites that certain persons named are material witnesses in a certain cause now pending in the District Court of Arapahoe county, State of Colorado, wherein Clarence H. Venner and others are plaintiffs, and the Denver Union Water Company and others are defendants ; that witnesses reside at New York, in the county and State of New York, and that their personal attendance cannot be procured at the trial of said cause, and that the depositions of said witnesses are desired by the plaintiffs, pursuant to an order of court entered in said cause on the 18th day of February, 1898, and appointing said McCabe to examine the said witnesses, and authorizing and requiring him to cause said witnesses to come before him at such time and place as he might designate and appoint, and diligently examine said witnesses on the oath and affirmation of said witnesses, and faithfully to *take the depositions*

*of said witnesses upon all interrogatories and cross-interrogatories in respect to the questions in dispute*; and said commission was issued in the name of Elias F. Dunlevy, clerk of the District Court of Arapahoe county, Colorado, and the seal thereof at Denver, in said county and State, and signed "Elias F. Dunlevy, Clerk. H. W. Hermann, Deputy." Annexed to the mandate is the affidavit of Clarence H. Venner, one of the plaintiffs in the action, reciting the issuance of the depositions; the subpœna requiring the relator to appear before the commissioner and testify, issued by one of the justices of the Supreme Court; the service of said subpœna upon the relator; the attendance of the relator before the commissioner; the questions asked by the relator by counsel for the plaintiff; the refusal of the relator to answer those questions, and a statement by the affiant that each and all of said questions were pertinent and proper, and that the testimony of the said McDonald, in answer to said questions and each thereof, is so far material that without it the plaintiffs in said cause pending in said District Court in the State of Colorado cannot safely proceed with the trial of said action. There is also annexed to the said warrant a subpœna with proof of service issued by one of the justices of the Supreme Court. Upon the hearing upon this writ and return before a justice of the Supreme Court, the relator was discharged upon the ground that McCabe had no power to commit a witness to jail for refusing to answer questions propounded to him, and the question before us is as to the sufficiency of this alleged mandate of the commissioner to justify a detention of the relator until he should have obeyed the orders of the commissioner and answered the questions propounded to him.

The mandate itself does not, in terms, adjudge this relator guilty of a contempt, nor does the commissioner appear to have passed upon the materiality of the questions that the relator was required to answer. Indeed, it does not appear that he had power under the commission to determine that question, as he is required to take the depositions of the witnesses upon "all interrogatories and cross-interrogatories in respect to the questions in dispute." Nor does it appear that the relator had notice of the application to the commissioner to issue this warrant, or had an opportunity to be heard before he was summarily arrested and deprived of his liberty. The commission is directed to the commissioner, describing him as a notary

public in and for the county and State of New York, and it appears from a paper annexed to the petition that he was selected by consent of the parties as the commissioner before whom this testimony was to be taken. The commission seems to have been issued by the clerk of the court by the consent of the parties to that action, and whatever power this commissioner had was conferred upon him by his appointment as commissioner by the court of the State of Colorado, and under the power thus conferred upon him he is carrying out a mandate of such State within this State. He is not acting under any power conferred upon him by any court or judge of this State. It is claimed that the power which he exercised is conferred upon him by the provisions of section 920 of the Code of Civil Procedure. By article 3, title 3 of chapter 9 of the Code, provision is made for taking depositions within this State to be used without the State. By section 914 of the Code it is provided that "a party to an action, suit, or special proceeding, civil or criminal, pending in a court without the State, either in the United States, or in a foreign country, may obtain, in the manner prescribed in this article, the testimony of a witness within the State, to be used in the action, suit, or special proceeding."

By section 915 of the Code, it is provided that a justice of the Supreme Court, or a county judge, may issue a subpoena to a witness commanding him to appear before the commissioner named in the commission. By section 919 of the Code, it is provided that "the officer before whom a witness appears, in a case specified in this article, must take down his testimony in writing, and must certify and transmit it to the court, in which the action, suit or special proceeding is pending, as the practice of that court requires;" and by section 920 of the Code it is provided that "a person who fails to appear at the time and place specified in a subpoena, issued as prescribed in this article, and duly served upon him; or to testify; or to subscribe to his deposition, when correctly taken down; is liable to the penalties which would be incurred in a like case if he was subpoenaed to attend the trial of an action in a Justice's Court; and, for that purpose, the officer before whom he is required to appear possesses all the powers of a justice of the peace upon a trial." By section 3001 of the Code it is provided that where a witness, attending before a justice in an action, refuses to answer a pertinent

and proper question, and the party at whose instance he attended makes oath that the testimony of the witness is so far material that without it he cannot safely proceed with the trial of the action, the justice may, by warrant, commit the witness to the jail of the county, and by section 3002 of the Code it is provided that "the recusant witness must be closely confined, by virtue of the warrant, until he submits to be sworn or affirmed, or to answer, \* \* \* as the case may be; or is otherwise discharged according to law." In a late case in the Court of Appeals (*Matter of Searls*, 155 N. Y. 333) it was held that a justice of the Supreme Court who had issued a subpoena requiring a witness to attend before a commissioner had no power to punish such witness for a refusal to answer a question put to him in the course of the proceeding; that, as a justice of the peace at a trial had power to punish a witness who refused to appear or to answer a proper question by fine or imprisonment, the witness must be compelled to testify by the commissioner before whom he was examined or not at all, and while the justice of the Supreme Court who issued the subpoena could doubtless have punished the defendant for any disobedience of the order to appear before the commissioner, he had no power to punish him for refusing to answer questions in the course of the examination; that the mandate of the justice of the Supreme Court requiring the witness to appear before the commissioner was satisfied when the witness appeared to testify; that the contempt charged was a contempt of the authority of the commissioner acting under the commission and the laws of this State which provided for its due and proper exercise; that the witness could not be required to answer for it except under the provisions of section 920 of the Code in the manner, and before the officer, there designated. We are now presented with the question whether the Legislature had the power to confer upon a commissioner appointed by the courts of another State to take testimony in this State power to punish a witness appearing before him for a refusal to answer any question that the party to the action swears is material and necessary upon the trial of the action in the other State and by a warrant directed to a sheriff to imprison such witness until he should comply with the directions of the commissioner. By section 1 of the fourteenth amendment to the Constitution of the United States it is provided, "Nor shall any State deprive any person of life, liberty



or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." By section 6 of article 1 of the Constitution of the State of New York it is provided that "no person shall be \* \* \* deprived of life, liberty or property without due process of law." The relator claims, and the court below has found, that this warrant is not due process of law. This relator has been deprived of his liberty by a mandate of a commissioner who is appointed by the court of a foreign State to take testimony within this State. That commissioner derived no authority and does not exercise any judicial function under the laws of the State of New York. He is not connected in any way with the administration of justice in this State. The process that he has issued is to enforce an order of the court of the State of Colorado directing him to take the evidence of this relator and transmit it to such foreign court for the purpose of the trial of that action in such court. His power to act is derived entirely from the appointment of the court of another State. The action in which he assumes to act is pending in the court of another State. Is his warrant, commanding a sheriff or marshal to arrest a person who has been summoned before him as a witness, issued by such a person, due process of law in this State? I think it is not. As before stated, the warrant does not in terms adjudge the relator guilty of contempt. It recites that certain pertinent and proper questions were propounded to the witnesses; that the witness refused and continues to refuse to answer each and every of said questions, and thereupon commands the marshal to convey the said relator to the custody of the sheriff of the city and county of New York and commands the said sheriff to receive the said relator into his custody into the jail of New York county and to safely keep and closely confine him in such jail until he shall submit to answer the said questions and each of them. To justify such a warrant it must be made to appear that the person arrested under it was in contempt or had violated some lawful mandate of some officer with authority to propound the question, and this relator could only be deprived of his liberty by due process of law. In the judicial discussion in cases in which this provision of the Constitution of the United States and the Constitution of the State of New York has been under consideration, it has been universally held that due pro-

cess of law is "law in its regular course of administration through courts of justice." (Bouv. L. Dict., under the head of "Due Process of Law.") The Court of Appeals of this State in the case of *Westervelt v. Gregg* (12 N. Y. 209), say: "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights;" and in the case of *Wynehamer v. The People* (13 N. Y. 395) Judge COMSTOCK says: "The better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice." We have it thus authoritatively determined that the process of law without which no man can be deprived of his liberty is process issued in the regular course of the administration of the law through courts of justice. By the Constitution of this State the judicial power is vested in certain courts there named, with authority to the Legislature to establish other courts with limited jurisdiction, and the judicial power is exclusively vested in these courts. In *Kilbourn v. Thompson* (103 U. S. 190) Mr. Justice MILLER, in delivering the opinion of the court, said: "It is believed to be one of the chief merits of the American system of written constitutional law that all the powers intrusted to government, whether State or National, are divided into the three grand departments, the executive, the legislative and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined." Judge RAPALLO, in delivering the opinion of the Court of Appeals in the case of *People ex rel. McDonald v. Keeler* (99 N. Y. 480), says: "The Constitution of the United States declares, in terms, that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, order and establish. Although no similar declaration is contained in the Constitution of this State, still it is a recognized principle that in the division of power among the great departments of government, the judicial power has been committed to the judiciary, as the executive power has been committed to the executive department, and the legislative to the Legislature, and that body has no

power to assume the functions of the judiciary to determine controversies among citizens, or even to expound its own laws so as to control the decisions of the courts in respect to past transactions." Turning to the Constitution of this State we find that by article 3 it is provided that the legislative power of the State shall be vested in the Senate and Assembly. By article 4, it is provided that the executive power shall be vested in a Governor, and article 6 provides for the judicial power and the courts in which it is vested. By that article a Supreme Court is constituted with general jurisdiction in law and equity. The Court of Appeals is constituted to review the decisions made by the Supreme Court. County Courts and inferior courts of record are established and the Constitution regulates the appointment and election of judges of these courts. There is also provision for the election of justices of the peace, with power given to the Legislature to establish civil and criminal courts not of record. In addition to the judicial powers granted by article 6 of the Constitution certain powers, in their nature judicial, are by the express terms of the Constitution vested in the Legislature. In the case of *People ex rel. McDonald v. Keeler (supra)*, when the question as to the constitutionality of an act of the Legislature giving to the legislative bodies a power to punish for contempt was before the court, the court upheld the constitutionality of the statute only upon the ground that the statute in question was to enforce the powers in their nature judicial which were by the express terms of the Constitution vested in the Legislature. A careful study of the opinion in that case makes it clear, I think, that an act of the Legislature authorizing an executive officer of the State to commit a person to jail for a contempt in refusing to obey his mandate, or refusing to answer questions propounded by him to a person called before him would be unconstitutional, as a warrant to enforce such a statute would not be due process of law within the meaning of the Constitution. The power of the Legislature to pass an act authorizing one of the legislative bodies to commit for a contempt was upheld, because the Constitution having invested the Legislature with certain powers in their nature judicial the Legislature could by appropriate legislation provide for the proper exercise of such powers. The court say at page 482: "It is a limited power, and should be kept within its proper bounds, and,

when these are exceeded, a jurisdictional question is presented which is cognizable in the courts." The same principle was established in *Kilbourn v. Thompson* (*supra*). It appears, therefore, to be settled that by the Constitution judicial power is vested in the courts established by or provided for in the Constitution and in other officers or bodies where the Constitution, by express provision, vests in such other officers or bodies powers in their nature judicial; that the judicial power is exclusively vested in these officers or bodies thus expressly designated by the Constitution, and that the Legislature has no power to vest in other bodies or departments of the government judicial powers or to authorize such other departments or officers of the government to issue process which shall be due process of law. We come then to the question as to whether or not authority given to an individual who is not connected with the administration of justice in this State, who has no judicial power vested in him by either the Constitution or the Legislature, not connected in any way with any of the courts or bodies in whom the judicial power is vested, can be authorized by the Legislature to issue a process which shall be due process of law by which an individual may be deprived of his liberty or his property. It can hardly be claimed that this "commissioner and notary public" is connected with the judicial department of the government of this State. He does not act by virtue of his holding the office of notary public within this State. The addition of that title to his name is merely *descriptio personæ*. He is not appointed by any State authority, but is appointed by the court of a foreign State. He may as well be a citizen of the foreign State owing it his allegiance. He receives no compensation for his services from the State or under the laws of this State. He is not under the control of any of the officers or departments of the State government. He cannot be punished for an abuse of his power by this State. No appeal from his decision can be taken to any of the courts of this State. He acts without responsibility to any official or department of the State government, and while he does not formally adjudge a person whom he has determined to imprison in contempt under his warrant, uncontrolled by those officers selected by the people to administer the judicial power of the State, his mandate takes from a citizen of this State his liberty, and from that mandate the citizen

has no appeal. If the Legislature of this State has power to confer upon this "commissioner and notary public" power by a warrant to commit to prison any citizen of this State who has refused to obey his directions in regard to an examination under a foreign commission issued to take testimony in this State, I can see no reason why a Legislature might not grant to the Governor, or to the mayor of the city of New York, or to the agent of a Governor of any other State or Territory appointed to execute some functions within this State the power to arrest and imprison; and that a person arrested or imprisoned under such a mandate would have no redress. The court, upon a writ of habeas corpus, could not review the action of the commissioner or other person authorized to issue such a mandate, so long as such person acted within the jurisdiction conferred upon him by the act of the Legislature, for, by section 2033 of the Code, it is provided that if it appears upon the return that a prisoner is in custody by virtue of a mandate in a civil cause, he can be discharged only in one of the cases specified, neither of which would authorize the court to review the action of the individual issuing the mandate so long as that officer acted under the power conferred upon him by law. By subdivision 6 of this section it is provided that the prisoner can be discharged only where the mandate is not authorized by a provision of law. In other cases where the Legislature has given to a public body a right to call witnesses or ascertain questions of fact, it is the Supreme Court or a justice thereof who is authorized, upon the application of such body or officer, to require a person so called as a witness to answer proper interrogatories, and upon the failure to obey this direction of the court, or a justice thereof, authority is given to punish for contempt; but in that case it is the direction of the court or judge before whom the witness is brought that is enforced, and thus around such individual is placed the safeguard of a determination by a judicial officer vested by the Constitution and laws with the power to determine judicial questions, and his mandate would undoubtedly be due process of law. But, by this legislation, construed as it has been by this commissioner, there is attempted to be given to an individual, who, so far as appears, is a citizen of another State, acting under the authority conferred by another State, authority to come within this State, and by

his simple warrant deprive a citizen of this State of his liberty. That it could have been the intention of the Legislature to invest such an officer with such power, seems to me to be impossible to believe; but whether it was such intention or not, it seems to me clear that any attempt to give to such a person such power in this State would be in violation of the express provisions of the Constitution before cited, and would subject a citizen of this State to indefinite imprisonment without due process of law. It is said that this mandate not adjudicating the relator guilty of contempt does not assume to punish him for an offense, but simply detains him until he answers the questions which are material in the action in the State of Colorado. In effect, however, the mandate deprives the relator of his liberty until he obeys the order of the commissioner. If the Legislature has power to authorize a person not charged with the administration of justice to enforce his orders to answer such questions as may be asked by a mandate requiring the imprisonment of a citizen refusing obedience to such orders, I can see no reason why the Legislature cannot give to any person power to enforce any orders that he may give by a similar process. Section 920 of the Code gives no power except to impose a penalty. It provides that a person who fails to appear, or to testify, or to sign his testimony, is liable to the penalties which would be incurred in a like case if he was subpoenaed to attend the trial of an action before a justice of peace, and for that purpose, viz.: To impose such penalties, the officer before whom he is required to appear possesses all the powers of a justice of the peace upon the trial. The commissioner is, therefore, only given power to impose a penalty or to punish for refusal to testify, and I do not think the Legislature can confer such power upon this individual.

For this reason, I think the mandate under which the respondent acted in arresting the relator was absolutely void, and the order appealed from should be affirmed, with ten dollars costs and disbursements.

RUMSEY and McLAUGHLIN, JJ., concurred; BARRETT, J., dissented.

RUMSEY, J.:

I concur in the conclusion reached by Mr. Justice INGRAHAM in his opinion; and in view of the importance of the question to be

determined, and the fact that the members of the court are not unanimous, it is not improper that I should state the reasoning by which I reach the same conclusion. In this proceeding we are called upon to determine the validity of a commitment issued by a commissioner of a foreign court, consigning a citizen of this State to prison until he shall obey the instructions of the commissioner by answering a question which this commissioner has determined to be a pertinent and proper one. The single question presented to us is whether or not the commitment is valid. We are not called upon to determine whether the question which this relator is called upon to answer is in fact pertinent and proper to the determination of the litigation in which he is sworn as a witness. That question has been determined once for all by the commissioner upon whom the statute puts the duty of deciding it. (*Matter of Searls*, 155 N. Y. 333, 340.) Indeed, there is no way in which the determination of the commissioner in that regard can be reviewed. However impertinent, irrelevant, immaterial, or even indecent a question may be the law not only puts upon the commissioner the duty, but gives him the power to say that it is relevant and proper, and no court in this State has any authority to review his determination. Having the power, if he determines that the question is pertinent and proper, and the party procuring the examination makes the affidavit required by section 3001 of the Code, the witness must answer; or, if he refuses to answer, he is committed to prison. It is idle to say that the power to commit one to prison under such circumstances does not touch the liberty of the person who is confined there by virtue of it. A power which can impose upon any citizen the necessity to give information about his most private affairs in a matter in which he is not at all concerned, at the peril of imprisonment if he refuses, certainly affects his liberty in an eminent degree. It will not do to say that he may relieve himself of the imprisonment by answering the question. Whenever one is committed for refusal to perform an act he can get free by doing it, but no court has ever suggested that fact as a reason for sustaining the commitment. The fact that he is compelled involuntarily to perform a certain act, or to subject himself to imprisonment, necessarily affects his liberty. He is, therefore, entitled to the protection of that article of the Constitution which prescribes that no man

shall be deprived of his liberty without due process of law. It is not necessary for me to consider the elements necessary to constitute due process of law. I concur in the definition of Mr. Justice INGRAHAM from which it clearly appears that to constitute that process it is essential that there should be a hearing before some officer who is properly authorized to pass upon the questions necessary to be determined, before the imprisonment can be inflicted. Was there such a hearing in this case? The proceeding in which this commitment was granted was not one originated or pending in the courts of this State. It was begun in a District Court in the State of Colorado; that portion of it which is to be performed in this State was originated by an order of that court, is pending under the direction of that court, and may be brought to an end at any time when that court sees fit to do so. The person before whom it is conducted, although he happens to be a notary public of this State, gets no power to act from any of the constituted authorities of this State. He is in no sense a judicial officer, even if he can be said in any just sense to be an officer at all. He takes no oath of office. The Constitution provides the way in which officers shall be elected or appointed (Art. 10, § 2), and no one can hold any office in this State until he has been chosen to it in one of the ways thus prescribed. Nothing of the sort is pretended to have been done in the case of this commissioner. His appointment is derived solely from the court of Colorado, and he would have the same power to do this act sought to be reviewed, whether he were a citizen of this State or of Colorado, or of any other country in whose court the deposition is to be taken. Having been thus appointed, section 920 of the Code of Civil Procedure has given to him the powers of a justice of the peace upon a trial, and it is by virtue of that provision of the statute that he has made this commitment. The authority he professes to exercise is that given to a justice of the peace by section 3001 of the Code of Civil Procedure, which provides that where a witness attending before a justice in the action refuses to answer a pertinent and proper question, and the party at whose instance he attended makes oath that the testimony of the witness is so far material that without it he cannot safely proceed with the trial of the action, the justice may by warrant commit the witness to the jail of the county. The nature of this power it is not very material



to consider. I have no doubt that it is a power to punish as for a contempt of court. It is so spoken of and regarded by all the cases with which I am familiar. (*Rutherford v. Holmes*, 66 N. Y. 368; *Whitcomb's Case*, 120 Mass. 118; *People ex rel. McDonald v. Keeler*, 99 N. Y. 463.) But whether it is a power to punish as for a contempt of court or not, it certainly is a power to commit a person to the county jail until he shall perform an act which he is unwilling to do, and which he is required to do by the official who signs the commitment. Before that commitment can be signed, it is necessary that there should be a determination of the commissioner that the question is material and proper. (*Matter of Searls*, 155 N. Y. 333, 340.) That determination lies at the foundation of the power to commit. Until that is made the witness cannot be compelled to answer, nor can he be committed for a refusal to answer unless that conclusion has been reached by the commissioner. Although the witness may be examined upon interrogatories settled by the court of Colorado, its allowance of interrogatories is a matter of no importance. For the purposes of this proceeding the question is not pertinent and proper unless it has been so determined by the commissioner named in the commission issued out of that court. It is clear, therefore, that at the foundation of this proceeding there lies the necessity to determine a pure question of law, and the power to determine that question is clearly judicial in its nature. Indeed, the power to punish for contempt is judicial in its nature, and only arises in a judicial proceeding, and can only be exercised under the law of the land by a competent judicial tribunal which has jurisdiction in the premises. (6 Am. & Eng. Ency. of Law [2d ed.], 1058; *Interstate Commerce Commission v. Brimson*, 154 U. S. 485.) This conclusion was reached by the Supreme Court of Massachusetts in *Whitcomb's Case* (120 Mass. 118), in which the question presented was whether a power given to the common council of the city to commit and punish for contempt was within the authority of the Legislature. It appeared in that case that one Whitcomb had been summoned to testify before a special committee of the common council of the city of Boston, which had been appointed with full powers to investigate and report upon charges against members of the common council for violation of their duties; and that as such witness a certain material

question was propounded to him, which he refused to answer. Thereupon, in pursuance of the authority given by the statute, he was committed to the county jail for a certain time, unless he should sooner express his willingness to appear and answer. Upon a habeas corpus, the sole question presented to the court was, whether the authority given to the common council to commit for contempt in that proceeding was within the power of the Legislature. Chief Justice GRAY, in examining the question, determines, in the first place, that this power thus given to the common council was a power to punish for a contempt, and that that was a judicial power. The conclusion reached by the court was, that the Legislature could not delegate to or confer upon municipal boards or officers that are not courts of justice, the authority to imprison and punish without right of appeal or trial by jury, and that the statute which conferred that power upon the common council was unconstitutional. I cannot see any distinction in principle between that case and the one at bar. (See, also, *Langenberg v. Decker*, 131 Ind. 471; *In re Huron*, 58 Kans. 152.) The nature of the power to punish for contempt has been frequently examined in the courts of this country and of England; and it is universally held that such power is judicial in its nature, and that except as it may inhere in certain legislative bodies when they are engaged in investigations which are judicial in their character, it can only be exercised by judicial officers.

In addition to the cases cited above there may be cited upon that principle: *Kielley v. Carson* (4 Moore P. C. 63); *Kilbourn v. Thompson* (103 U. S. 168); *Burnham v. Morrissey* (14 Gray, 226). It may be said that this power has been given by the Legislature to many boards and officers whose duties are not judicial. The question of the constitutionality of those statutes is not before us. In that regard it is only sufficient to say, as was said by Judge GRAY in *Whitcomb's* case, that the constitutionality of the provision committing to masters in chancery and auditors the power over witnesses to punish them for contempt may admit of more doubt.

The single question presented here is whether this particular power given to a person who is not a judicial officer, and who does not hold his position by virtue of any authority of this State, is within the power of the Legislature.

For the reasons thus suggested, as well as for those given by Mr. Justice INGRAHAM, I conclude that it is not.

INGRAHAM and McLAUGHLIN, JJ., concurred.

BARRETT, J. (dissenting):

The sole question here is whether section 920 of the Code of Civil Procedure is or is not unconstitutional. If it is, then there is no constitutional provision of law to compel a witness to testify in this State under a foreign commission. For it was held in the *Matter of Searls* (155 N. Y. 333) that a justice of the Supreme Court was without power to hear or determine an application to punish such a witness for refusing to answer questions put to him before a commissioner. The power to so punish, said the court in that case, rested exclusively with the commissioner under this section. The point now raised is a narrow one. It is said that the witness is deprived of due process of law, *first*, because the pertinency and propriety of the questions which he refused to answer were determined by the commissioner, and, *second*, because the commitment which followed his refusal was granted and signed by that officer. The claim is, that the commissioner is not a judicial officer, and that the witness could be constitutionally deprived of his liberty only by the act of some member of the judiciary of the State. While agreeing with the general view of this subject expressed by Brother INGRAHAM, I am unable to concur in his application of certain well-settled principles to the precise case under consideration. The point of divergence between us is where the application of these principles begins. The provision of the Constitution was, in my judgment, primarily aimed at a direct attack upon the individual; that is, at any act or proceeding the immediate purpose of which is to deprive him of life, liberty or property.

The cases of *Langenberg v. Decker* (131 Ind. 471); *Whitcomb's Case* (120 Mass. 118) and *In re Huron* (58 Kans. 152) are examples of this view, although in one of them (the Indiana case) the court rested its judgment upon a special provision of the Constitution of the State in terms excluding one department of the government from exercising any of the functions of another. Here, however, there is no proceeding against the individual; nothing whatever aiming at a deprivation of his life, liberty or property. The law of our State requires him to give certain information, to testify to facts

within his knowledge. The direct object of the proceeding bears solely upon the rights of others, namely, the plaintiff and the defendant in the action. The witness' testimony may affect the property of these others; it cannot seemingly affect his. He has apparently no interest whatever either in the litigation or in the deposition. The proceeding here does not directly touch his life, liberty or property. Even as a mere witness, however, he is doubtless entitled to "due process of law," for the proceeding may possibly affect him indirectly. But what is due process of law *as to him*? Plainly, the service of a subpoena issued by competent authority, requiring his attendance before a particular person authorized by the law of this State to take his deposition, at a particular place, on a particular day and hour. That he had in the present case. The law gave it to him. The law also provides that he shall attend before the particular person so authorized by it to take his deposition at the time and place named in the subpoena, and then and there testify to facts within his knowledge. The same law provides, in substance and effect, that, in case of his refusal to so attend, or upon attendance to so testify, he shall be deprived of his liberty until he complies. Where is the violation of his constitutional rights in this legislation? The object of the proceeding was not to restrain him of his liberty, but to secure his testimony. The restraint is but in aid of the real purpose. And, further, he was not punished in the ordinary sense of punishment. No fine was imposed upon him; no specified term of imprisonment awarded. The law simply enforced its mandate. Under the law commitment directly follows non-compliance as effect follows cause. No further exercise of judgment intervenes between the refusal and the commitment. The moment the witness complies he is free. Until then, as between confinement and obedience, he chooses the former. The Code, it is true, provides for a formal commitment to be signed by the commissioner. That, however, was unnecessary. The law would have been constitutional, and equally effective, had it simply provided that the sheriff should take the witness into custody and confine him upon the commissioner's certificate or record of non-compliance.

It is, however, contended that the law must limit its authorization to act as commissioner to one who is a member of the judiciary of the State. It will not suffice, in this view, should the commissioner

named in the *dedimus potestatem* be in fact a member of that judiciary. The reasoning is that such an appointment would be but an act of courtesy on the part of the foreign court. In that case, too, the judge named in the *dedimus* would act here, not as a judge, but as commissioner. The law, then, so the argument runs, is unconstitutional, because it does not, in terms, confine the foreign court's area of selection to the members of our own judiciary. Upon that postulate the fact that the commissioner in the present case is a notary public, appointed under our own law and intrusted thereby with important functions, is treated as beside the question. He may be a judicial officer of the State, and our highest court may even have held that his duties are of a judicial character. (*People v. Rathbone*, 145 N. Y. 434; *Matter of Searls*, *supra*.) But that does not help the law. As commissioner he is acting, not as a notary public, not as a public or judicial officer, but simply as the agent of the foreign court. That court might have appointed some one who was not a public or judicial officer of this State. Consequently the law is unconstitutional. It is thus unconstitutional because it does not set its face against this — because, in fact, it does not affirmatively require the appointment as commissioner of one of our own classified judicial officers; and it cannot be validated by the accident of the appointment as commissioner of one who happens to be such an officer. This reasoning seems — with respect, be it said — like a travesty upon due process of law as applicable to a witness. Its fundamental fallacy is in failing to distinguish between powers which, under the Constitution, can only be exercised by the judiciary, and powers of a quasi-judicial character, which the Legislature is constitutionally authorized to confer upon whom it pleases. The power to determine the pertinency and propriety, *quoad* a witness, of a question propounded under a foreign commission, is clearly within the latter category. It is intrusted to the commissioner because it is but a subsidiary function in the preparatory phase of the litigation. It is based upon the sensible theory that the substantial rights of the witness do not demand that the judiciary should be burdened with such trivialities. There is nothing in the Constitution which requires the personal intervention of the judges in all subsidiary matters, even though such matters call for the exercise of a certain amount of judgment; and a law impos-

ing a duty upon others with regard to such subsidiary matters will not be declared invalid if it can fairly be upheld. It is for the Legislature, within reasonable limitations, to say what are strictly judicial functions, which can be exercised only by judges of the court, and what are minor, formal or subsidiary functions, which may be intrusted to clerks, assistants or other persons. In the latter category, by almost universal comity, have been embraced commissioners appointed to take depositions outside of their respective States. The courts making such appointments invariably reserve to themselves their appropriate judicial functions, leaving it to the commissioner to pass only upon the general pertinency of the testimony. The just distinction between judicial and subsidiary functions is thus made. The pertinency and propriety of questions, *quoad* a witness, have no necessary relation to their competency or ultimate admissibility upon the trial. A decision upon the latter head is strictly judicial to be made only by the judges of the court in which the action is pending. The decision as to the pertinency of the evidential material to be subsequently subjected to judicial scrutiny is a subordinate function, which may be properly delegated to others. So far as the witness is concerned, a question is pertinent if within the general scope of the inquiry; and it is proper if it invades no right of his as such witness. It is said, however, that even within this limited power the commissioner may possibly wrong or oppress the witness. Any one upon whom power is conferred may, of course, abuse his power. Should the commissioner do so, should he direct the witness to answer questions which are wholly impertinent or personally indecent — seemingly a rather far-fetched idea — the remedy by certiorari, with a stay of the commissioner's determination pending review, is open to him (Code Civ. Proc. § 2131), and it seems to be reasonably adequate to protect him against mere insult or oppression. If, then, this minor function, namely, that of determining what is generally pertinent to the inquiry, be constitutionally conferred upon the commissioner, the witness surely has due process of law; and it only confuses the real question on that head to dwell in the same connection upon the formal means adopted by the Legislature to compel submission to the exercise of the power. If the primary power exists, the secondary follows as a sequential mandate, legislatively directed.

The commissioner exercises no further judgment, much less discretion, on the subject of the commitment. Having lawfully decided that the questions are pertinent and proper, his *quasi* judicial power of determination is exhausted, and upon non-compliance the commitment follows, in effect ministerially. His signature thereto is simply the sheriff's authority to hold the witness until he answers. It cannot be withheld. Having once passed judgment upon the pertinency and propriety of the question, he *must* compel an answer by exercising the powers of a justice of the peace upon a trial.

In the precise case presented by this record it might be said that these considerations are in a measure academic, for it will be observed that there is here absolutely no question with regard to the witness' rights as such. He did not decline to speak upon the ground that his answers would tend to criminate or degrade him. He simply refused — without any assigned reason — to speak at all. He raised no question whatever as to the propriety of the questions propounded, or as to their relevancy or competency. He had, indeed, nothing to do with their relevancy or competency. Nor, as we have seen, had the commissioner. That officer's judgment was limited to the pertinency and propriety of the questions; that is, to determining whether they were entirely foreign to the litigation, or were within its general area. All else was left to the court from which the commission issued. In all else, too, the parties to the litigation were alone interested. Thus the commissioner here made no adjudication upon the witness' rights. He simply decided that the questions propounded were within the general scope of the litigation between the parties. That was not an adjudication for or against the witness. It was simply a prerequisite to commitment for refusal to answer a question which, as to him, was pertinent and proper. But even if the commissioner had adjudicated upon the witness' rights, the conclusion would be the same. The only right which the witness has is his privilege with regard to answers tending to criminate or degrade him. If any question had arisen here on that head, and the commissioner had passed upon it adversely to the witness, his action, as already indicated, could have been reviewed by certiorari, and the execution of his determination in the meantime stayed. Such action on the commissioner's part would have been, as to the witness, in its nature judicial, just as is the action of legis-

lative committees, and of certain boards and commissioners exercising judgment in matters within their jurisdiction. The commissioner's action here would be thus reviewable (and due process of law thereby further extended to the witness), because he would to that extent exercise judgment upon a subject-matter over which the Legislature had (constitutionally) given him qualified and limited jurisdiction. In the concrete issue now presented, however, the latter question does not arise. As there was no adjudication against the witness his attitude was this:—being required by law to speak, and giving no reason whatever why he should not speak, he capriciously remained mute. It seems to me an extraordinary proposition that at this stage the statute in question deprived the witness of due process of law merely because the mittimus was not required to be signed by some member of the judiciary of the State. It might as well be said that the Code provision which permits an execution against the person to be signed by an attorney is unconstitutional. In the latter case the statute gives the defendant due process of law when it requires a preliminary verdict in tort to be rendered against him. In the case at bar, it gives the defendant due process of law when it requires him, upon being duly subpœnaed, to appear and answer a question which the commissioner lawfully determines to be pertinent and proper. It is that lawful determination and that alone which authorizes and compels the commitment.

By an act passed in 1887 (Chap. 213) the Governor is empowered to issue subpœnas in any matter pertaining to an application for clemency, and to compel witnesses to appear before him and answer. Section 5 of the act provides that the Governor shall possess all the powers in relation to such provisions which are possessed by any court or judge. Is this section, too, unconstitutional, because the Governor is not called upon to go to the judiciary for the enforcement of his mandate? He has, it is said, jurisdiction over the subject-matter of pardons, but still the question remains, could the Legislature constitutionally confer upon the executive the power to commit a witness? The answer, it seems to me, must clearly be in the affirmative. The Governor could exercise no such power under the general provision of the Constitution with respect to pardons. The Legislature alone could confer it. It is the statute law of the land which there requires the witness to attend and answer, and the



requirement is constitutional. It is the statute law, too, which provides for the recalcitrant witness' restraint until he answers, and that is equally constitutional. Under the act of 1887 the Governor is authorized to appoint a person to conduct the hearing. It would, in my judgment, be entirely constitutional had the act provided for the restraint of the recalcitrant witness upon the proper certificate of such person showing the recalcitrancy.

Acts like that under consideration are to be found in many of our sister States. They proceed upon principles of comity. Sister States, quite as much as the courts of different countries, are mutually bound to lend each other aid to promote the ends of justice. Efforts have frequently been made in the courts of other States, under circumstances like the present, to secure the discharge of recalcitrant witnesses on habeas corpus. These efforts have invariably failed. In none of the cases, however, relating to commitments by notaries public has this constitutional question been discussed. (*Ex parte McKee*, 18 Mo. 599; *Ex parte Priest*, 76 id. 229; *In re Abeles*, 12 Kans. 451.) Until now no one, it seems, has ventured to present it. In *Ex parte McKee* it is said that "A notary public being authorized to take depositions, and having the same powers for that purpose as are conferred on justices of the peace, may summon a witness before him, and may enforce his attendance if he fails to attend, and if he attends, and refuses to give evidence which may lawfully be required to be given, the notary may commit him to prison *until he gives the evidence.*"

To sum the matter up, in the case at bar the commissioner was empowered, by the law of this State, to take the deposition. So far that law was surely constitutional. It gave the commissioner jurisdiction over the subject-matter, namely, the deposition, a jurisdiction which he thus exercised under the direct confirmatory authority of this State. Possessing that jurisdiction thus directly conferred upon him by our law, the commitment was but ancillary thereto, an incident to its effective exercise. As in the Governor's case, the provision but gave effect to the constitutionally granted jurisdiction. Neither in the conferring of such jurisdiction, nor in the requirement to answer pertinent and proper questions, nor in the power given to the commissioners to determine what are pertinent and proper questions, nor yet in the method provided for compel-

ling answers to such questions, is the witness deprived of due process of law within the meaning and intent of the Constitution. The law itself points out the "process" throughout; and it is "due process," in that the witness is to be properly subpœnaed, is to be brought face to face with the commissioner, is to be there commanded to answer as required by an officer duly authorized by the law, and upon his refusal is to be restrained of his liberty only until he so answers. The substance of the commitment is the recital by the commissioner of the jurisdictional facts. The rest is mere matter of form.

The logical result of the opinion of the majority of the court is that no law for the taking of depositions in this State to be used in a sister State is constitutional which permits the due execution of the commission by one who is not a member of the judiciary of the State as defined in the Constitution. The practical effect of such a decision is to put an end to commissions and to relegate our State to letters rogatory. If, however, a law which authorizes the commissioner appointed by the courts of a sister State to execute such commission here, and as a part of his duty to pass upon the pertinency and propriety of the questions propounded to a witness thereunder, be constitutional (and I venture to suggest that its constitutionality has never before been questioned), then surely it is constitutional to provide for its enforcement in the manner here indicated. When the witness has been duly subpœnaed, has appeared before the commissioner and been sworn, and has refused without reason to answer, the mittimus at once runs against him, not, as we have seen, as an independent exercise of judicial power, but, in substance and effect, as the absolute mandate of the law. It follows immediately and directly upon his refusal to answer. Upon the statutory pre-requisites being complied with the commissioner has no discretion to grant or withhold it. He *must* thereupon exercise that particular power of a justice of the peace upon a trial. Nor would even a judge — had the act required the mittimus to be signed by such an officer — have any such discretion. In either case, compliance with the plain statutory duty could be compelled by mandamus.

I am, therefore, of the opinion that the section of the Code in question is constitutional, and that the order appealed from should be reversed and the prisoner remanded.

Order affirmed, with ten dollars costs and disbursements.

OTILIE SEIBERT, an Infant, by GEORGE H. FINCK, her Guardian ad Litem, and ELSIE SEIBERT, an Infant, by GEORGE H. FINCK, her Guardian ad Litem, Appellants, v. JACOB H. MILLER and Others, as Executors of, and Trustees under, the Last Will and Testament of JOHN W. MILLER, Deceased, and Others, Respondents.

*Will—when the surplus income of a trust fund passes under the residuary clause.*

Where a will which contains a residuary clause, providing that “All the rest, residue and remainder of the proceeds of my residuary estate and property, including all lapsed legacies and property not herein effectually given, devised or bequeathed, I give, devise and bequeath to the said Otilie Orphan Asylum,” creates a trust fund, out of the income of which the executors are directed to pay to the widow of the testator the sum of \$5,000 a year, in lieu of her dower interest, but makes no provision for the disposition of the surplus income accruing during the lifetime of the widow, the bequests to the other beneficiaries in the will being limited to specific sums, such surplus passes under the residuary clause to the residuary legatee.

APPEAL by the plaintiffs, Otilie Seibert and another, by George H. Finck, their guardian *ad litem*, from so much of a judgment of the Supreme Court, entered in the office of the clerk of the county of New York on the 16th day of May, 1898, upon the decision of the court rendered after a trial at the New York Special Term, as adjudges that “the following words in the last will and testament of John W. Miller, deceased, ‘All the rest, residue and remainder of the proceeds of my residuary estate and property, including all lapsed legacies and property not herein effectually devised, given or bequeathed, I give, devise and bequeath to the Otilie Orphan Asylum of East Williamsburgh, New York,’ be and they hereby are construed to be an unrestricted residuary clause, and that Jacob H. Miller, Nicholas Schultz, Jacob Schlegel and Richard Stacpoole, as executors of, and trustees under said will, be and they hereby are directed to pay to the Otilie Orphan Asylum all income from the estate of the late John W. Miller which may remain after the payment of the expenses of the estate and an annuity of five thousand dollars (\$5,000) a year to Sophia E. Miller, the widow of the testator.”

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And also from so much of the said judgment as adjudges that "all the trusts, dispositions and provisions contained in said last will and testament are valid."

The action was brought to obtain a judicial construction of the will of John W. Miller, which provides as follows:

"*Third.* I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, wheresoever and whatsoever the same may be, to my executors, the survivors and survivor of them, in trust, nevertheless, to retain my estate as invested at the time of my death so long as they may deem proper, or from time to time, as they deem prudent, to convert the same into money, and invest and reinvest the same, either upon bond and mortgage on improved real estate in the city of New York, or in improved real estate in said city, and to collect and receive the rents, interests and income thereof, and to collect and receive the rents, interest and income from my estate, and after paying any and all expenses, repairs, charges, taxes and insurance, to pay over out of the net income thereof to my beloved wife, Sophia E. Miller, for and during the term of her natural life, the sum of five thousand dollars per year.

"I also give, devise and bequeath to my wife the use, during the term of her natural life, of my dwelling house in New York city, together with all of the furniture and other personal property in or about my said house, and also the use of my farm in Erie county, New York, including furniture and all personal property of every name, nature and description on said farm. The use of said dwelling house and farm is given to my wife free from any expenses for taxes, assessments, insurance or repairs, which are to be paid by my executors. The foregoing provisions for her are in lieu and bar of her dower in my estate. My said farm and property thereon shall not be sold by my executors during her life except upon her written request.

"*Fourth.* Upon the death of my wife, or upon my death in case my wife shall not survive me, I direct that my said estate be converted into money, and that my executors sell my real and personal property at such time or times as they deem wise, and I give and bequeath the proceeds of my said estate as follows:

"I. I give and bequeath to my beloved grandchild Ottilie Seibert

the sum of fifty-five thousand dollars, and I give and bequeath to my beloved grandchild Elsie Seibert the sum of fifty-five thousand dollars.

"In case either my said grandchild Otilie Seibert or my said grandchild Elsie Seibert shall be under age at the time the legacy given to her becomes payable, I direct my executors to hold the same in trust during her minority, and to apply to the use of the grandchild for whom the said sum of fifty-five thousand dollars is intended, the sum of one thousand dollars per annum until such grandchild shall attain the age of twenty-one years, or sooner die, and accumulate for her the remainder of the income, and upon such grandchild attaining the age of twenty-one years, to pay over the said sum of fifty-five thousand dollars and any accumulation of income thereon to such grandchild, and in case of her death before attaining the age of twenty-one years to pay the same to her child or children her surviving, and in case my grandchild Otilie Seibert shall die before attaining the age of twenty-one years leaving no child or children her surviving, then to pay, assign, transfer and set over the said sum of fifty-five thousand dollars, one-half to the German Evangelical Aid Society, which now has its office in Fairfax street in the city of Brooklyn, and the remaining one-half thereof to the German Evangelical Synod of North America, located at St. Louis, Missouri, to be used for mission purposes in the East Indies; and in case my said grandchild Elsie Seibert shall die without issue, and before attaining the age of twenty-one years, to pay the said sum of fifty-five thousand dollars intended for her benefit to the Otilie Orphan Asylum, now located at Forest avenue and Butler street, East Williamsburgh, town of Newton, Queens county, New York.

"II. I also give and bequeath out of the proceeds of my residuary estate upon the death of my wife, or upon my death in case she shall die before me, to my brother Martin Miller of Jersey City, New Jersey, fifteen thousand dollars. To Mrs. Carrie Westrup of New York city, one thousand dollars; to my sister, Catherine Beyer, five thousand dollars; to Kate Herman of Warsaw, county of Wyoming, N. Y., five thousand dollars.

"III. I also give and bequeath out of the proceeds of my said residuary estate *upon the death of my wife*, or upon my death in case my wife shall not survive me, the sum of sixty thousand dollars to the said Otilie Orphan Asylum, now located at Forest

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avenue and Butler street, East Williamsburgh, Newton, Queens county, New York, for the erection of a building or buildings for said orphan asylum; and to the Evangelical Reform Church of the Dutch Reform Denomination, corner of Avenue B and Fifthstreet in the city of New York, under whatever name it may be incorporated, the sum of twenty-five thousand dollars. It is my wish that the said sum of twenty-five thousand dollars be invested and kept invested upon bond and mortgage upon improved real estate in the city of New York by said church, and the income collected and applied toward the payment of the salary of the present and any future minister of said church so long as the said church shall remain in its present religious sect or denomination.

"IV. After the foregoing legacies shall have been paid in full, I give and bequeath out of the proceeds of my residuary estate *upon the death of my wife*, or upon my death if she shall die before me, to the Five Point House of Industry in the city of New York, five thousand dollars; to the Wetmore Home (formerly known as the Home for Fallen and Friendless Girls) of New York city, under whatever name the same may be incorporated, five thousand dollars; to the German Evangelical Synod and Missionary Society of North America of St. Louis, Missouri, the sum of ten thousand dollars, hoping that the same will be applied for missionary purposes in the East Indies.

"In case the proceeds of my residuary estate shall not be sufficient to pay the three last named legacies in full, then they shall be paid *pro rata*.

"In respect to the other or prior legacies hereinbefore mentioned, it is my desire that the same be paid in full in the order in which the same are stated in this my will, so far as the proceeds of my estate shall be sufficient for that purpose.

"V. All the rest, residue and remainder of the proceeds of my residuary estate and property, including all lapsed legacies and property not herein effectually devised, given or bequeathed, I give, devise and bequeath to the said Otilie Orphan Asylum, of East Williamsburgh, New York."

*George H. Finck*, for the appellants.

*R. A. Stacpoole* and *John R. Abney*, for the respondents.

Judgment affirmed, with costs, on opinion of LAWRENCE, J., in the court below.

Present—VAN BRUNT, P. J., PATTERSON, O'BRIEN, INGRAHAM and McLAUGHLIN, JJ.

The following is the opinion of LAWRENCE, J., in the court below :

LAWRENCE, J. :

I do not regard the question, as to what the disposition should be of any accumulation of the plaintiffs' shares under the will, in case either or both of the plaintiffs should die during minority, as properly before the court at this time. It cannot be assumed from the evidence before me that any surplus will exist or that either of the plaintiffs will die without leaving lawful issue during her minority. As to the other branch of the case, it seems quite clear that the income which may arise, after the expenses for the management of the estate and the payment of the \$5,000 yearly to the widow, should go to the Otilie Orphan Asylum as the residuary legatee. The residuary clause provides as follows: "All the rest, residue and remainder of the proceeds of my residuary estate and property, including all lapsed legacies and property not herein effectually devised, given or bequeathed, I give, devise and bequeath to the said Otilie Orphan Asylum of East Williamsburgh, New York." There is no qualification of the terms of the residuary clause, and the well-settled rule is that unless a residuary bequest is circumscribed by words of unmistakable import, it will, to prevent intestacy, be construed so as to perform the office intended, *i. e.*, to dispose of all the residuary estate. (*Matter of Miner*, 146 N. Y. 121; *Floyd v. Carow*, 88 id. 560; *Riker v. Cornwell*, 113 id. 115; *Matter of Allen*, 151 id. 243.) There is no disposition of the surplus of income which may accrue during the widow's lifetime, and it cannot be assumed that the testator intended such accumulation should be for her benefit. The provisions of the will in favor of the widow are made in lieu of dower, and are so specific that it cannot be successfully contended that she should take any further benefit thereunder; nor can it be held that the plaintiffs are entitled to such surplus. Under the 4th clause of the will the bequest in

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favor of each of the plaintiffs is limited to the specific sum of \$55,000, which sum with the accumulation thereon is to be paid to them upon the attainment of their majority. The will is silent as to the disposition of any surplus other than that which may accrue upon the sum of \$55,000. I am, therefore, of the opinion that if any surplus accrues during the widow's lifetime upon the other portions of the estate the disposition thereof will fall under the residuary clause of the will. The question of costs will be reserved until the settlement of the judgment. Draw judgment and decision accordingly and settle on three days' notice.



# Cases

DETERMINED IN THE

## THIRD DEPARTMENT

IN THE

### APPELLATE DIVISION,

November, 1898.

FLOYD GATES, Respondent, v. FRED GATES and Others, Appellants,  
Impleaded with ALVIRA B. GATES and Others.

*Agreement by a party to make a child his heir and give him a son's interest in his estate — right of the child thereunder — a statement in a complaint that the plaintiff was an heir at law is a mere conclusion, not an independent cause of action.*

Where a party, who has since died intestate, has, with the consent of his wife, entered into an agreement with the mother of an infant, whose father was dead, to make the child "an heir" and "to give him the same interest which a son would have in whatever property he owned or might have at the time of his decease," the child is entitled to such a share of his estate as a son would be entitled to as an heir, if the estate were divided among such children as the intestate might have at the time of his death, and where the intestate has died without issue or descendants the child is entitled to the whole estate, subject to the dower interest therein of the widow of the intestate.

An averment in a complaint in an action brought by the child, setting forth the contract and his rights thereunder, and also setting forth that he was the only heir and, therefore, entitled to the possession of the property, sets forth only a cause of action which is based upon the contract — the statement that the plaintiff was the only heir and, therefore, entitled to the possession of the property being a mere conclusion.

APPEAL by the defendants, Fred Gates and others, from an interlocutory judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Cortland on the 3d day of March, 1898, upon the decision of the court rendered after a trial at the Cortland Special Term overruling the said defendants' demurrer to the plaintiff's complaint.

The complaint in this action alleges, among other things:

34	608
42	443
43	415
34	608
48	387
34	608
155	320
34	608
59	523
34	608
166a	270
34	608
71	220
84	608
77	1462
34	608
84	508

"That on or about the 1st day of Jan. 1862, this plaintiff then being an infant of the age of two years, his father being dead and his mother being the sister of the said Alonzo W. Gates' wife, the said Alonzo W. Gates, with the consent of his said wife, entered into a contract with the said Sophia Carr, this plaintiff's mother, whereby the said Sophia Carr, this plaintiff's mother, agreed to surrender up forever this plaintiff to the said Alonzo W. Gates, and to surrender and release all claims or rights of every name and nature which she had over said child by reason of being its mother, to the said Alonzo W. Gates, and whereby and in consideration of the said agreement of the said Sophia Carr the said Alonzo W. Gates agreed to take this plaintiff and to adopt him as his child, to rear, educate and maintain him, and to treat him as a member of his own family, and as a son in all respects, and to make this plaintiff an heir of the said Alonzo W. Gates, and to give to him the same interest which a son would have in whatever property he owned or might have at the time of his decease.

"That said agreement was fully understood and consented to by the wife of said Alonzo W. Gates, and was fully understood and agreed to by the said Alonzo W. Gates and by the said Sophia Carr, the mother of this plaintiff, and that immediately thereafter and in pursuance to said agreement the said Sophia Carr did surrender and give over to the said Alonzo W. Gates, this plaintiff, and released to the said Alonzo W. Gates, all rights or claims of every name and nature which she had to this plaintiff by reason of being his mother, and the said Alonzo W. Gates took and adopted this plaintiff as his child, took him into his family, and thereafter this plaintiff lived as a member of the said Alonzo W. Gates' family, took the name of the said Alonzo W. Gates and performed all the duties and obligations which a son owes to his parents to the said Alonzo W. Gates and his wife, and lived continuously with the said Alonzo W. Gates as his son and as a member of his family, and lived as a member of his household, except during temporary absences, continuously to the time of the marriage of this plaintiff, and thereafter, although this plaintiff, after his said marriage, which occurred on the 19th day of September, 1889, took up a residence apart from the said Alonzo W. Gates, he nevertheless continued to perform and dis-

charge his duties as a son to the said Alonzo W. Gates in all respects, and was treated as a son by the said Alonzo W. Gates up to the time of his decease, and that frequently during said time the said Alonzo W. Gates promised and agreed to so fix, arrange and dispose of his property so that at the time of his death this plaintiff should have the same interest in whatever property the said Alonzo W. Gates died possessed of as a son, but the said Alonzo W. Gates died intestate and without making any provision whatever as to the disposition of his property, and the plaintiff further alleges that he was, on or about the said first day of January, 1862, legally and formally adopted as the son of the said Alonzo W. Gates, and thereafter and up to the time of the death of the said Alonzo W. Gates said adoption was repeatedly and continuously affirmed and ratified by the said Alonzo W. Gates, and the said Alonzo W. Gates agreed to give to this plaintiff at the time of his death the same interest in whatever property he then had which a son would be entitled to, and the plaintiff alleges that, by reason of the facts aforesaid, he is the only heir now living who is entitled to share in the estate of the said Alonzo W. Gates, subject, however, to the rights and interests of the said defendant Alvira B. Gates, the widow of the said Alonzo W. Gates, deceased, and is entitled both in law and in equity to share in said estate as aforesaid.

"The plaintiff further alleges that, notwithstanding the facts aforesaid, the said defendants claim to be the only heirs and next of kin of the said Alonzo W. Gates and claim the right to his estate to the exclusion of this plaintiff.

"That when letters of administration were issued, as aforesaid, no citations whatever were issued to or served upon this plaintiff."

Judgment was demanded :

"1st. That he be adjudged and decreed to be the son and heir at law of the said Alonzo W. Gates, deceased, and owner in fee simple of the lands and tenements hereinbefore described, subject to the right of dower of the said Alvira B. Gates.

"2nd. That this plaintiff be adjudged and decreed to be entitled to a specific performance of the contract herein set forth.

"3rd. That this plaintiff have an order of this court, ordering and directing that the said defendants Frank H. Sears and Alvira B. Gates, as administrator and administratrix of the estate of Alonzo

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W. Gates, deceased, and Berintha E. Owen, Olive M. Kelley, Clara Kimball, Lottie Anderson, Ella Gates, Anna Miller and Fred Gates be required to make, execute and deliver to this plaintiff a quitclaim deed of said premises, and for such other or further relief as to the court shall seem just and equitable, together with the costs and disbursements of this action."

*B. A. Benedict*, for the appellants.

*Nathan L. Miller*, for the respondent.

PARKER, P. J. :

It was said by Justice BARRETT in the case of *Gall v. Gall* (64 Hun, 601) that "it is undoubtedly the settled law of this State that 'where a certain and definite contract is clearly established, even though it involves an agreement to leave property by will, and it has been performed on the part of the promisee, equity in a case free from all objections on account of the adequacy of the consideration or other circumstances rendering the claim inequitable, will compel a specific performance,'" and such case was affirmed without opinion in 138 New York, 675.

This case, and the authorities therein cited, are direct authority for granting the relief asked for in the case at bar, provided the contract relied upon is sufficiently definite. (See, also, *Godine v. Kidd*, 64 Hun, 585.)

That the contract was actually made in the terms set forth in the complaint, and fully performed on the part of the promisee, must, upon this demurrer, be assumed. And that it involves an obligation on the promisor's part to leave property by will is no objection to its specific performance.

But whether the contract as thus set forth is of that certain and definite character which is requisite in order to compel a specific performance is the serious question in this case, and one over which I have great doubts.

The substance of the contract on deceased's part was to make the child "an heir, \* \* \* and to give him the same interest which a son would have in whatever property he owned or might have at the time of his decease."

A literal construction of this language leaves it exceedingly uncer-

tain what the promisor has undertaken to do. At the time the contract was made, there was no method known by which Alonzo W. Gates could make the child his "heir" in the accurate and legal signification of that term. By no proceeding known could he imbue him with the legal capacity to inherit. Moreover, if he had been able to do so, that promise literally taken involves no agreement to not disinherit him. Though made an heir, he would not thereby have acquired any certain right to any part of Alonzo W. Gates' estate.

The further agreement to "give him the same interest which a son would have" is also open to the same criticism. A son, by strict legal right, has no interest whatever in his father's estate. He may be given a greater or lesser portion thereof, as the father shall desire, or he may be entirely disinherited. A promise to give one "the same interest which a son would have" in the promisor's estate, literally construed, is but a promise to give whatever the promisor may choose to give.

And the objection is very forcibly urged upon us by the appellant's counsel that such a promise is of such an indefinite and uncertain character that it is not one which equity could or, under its well-settled rules, will attempt to specifically enforce. (22 Am. & Eng. Ency. of Law, 1006.)

It cannot be doubted, I think, but that the parties to this contract understood that Alonzo W. Gates was not only to adopt the child and rear him in his own family as if he were his own son, but that upon his decease he was to leave him some portion, at least, of the property which he might then own. The mother parted with her child upon that understanding, and the child, during all the years that Gates lived, took his name, and seems to have at all times recognized and faithfully performed those duties which, as a son, would be due from him to Gates as his father. Both parties seem to have fully performed the contract up to the time of Gates' death, and the only breach complained of is that Gates has never performed that part of it relating to the disposition of his property after his death.

Though the literal meaning of the words used do not import such an agreement, the force that is given to them in their general and popular use, and all the circumstances of this case, indicate that

such must have been the intent of the parties. An agreement to make a child one's heir and to give him a son's interest in his estate, if the mother would part with him then, certainly does not indicate an arrangement under which the child is to receive nothing whatever from the estate. There was no object or reason for making any promise upon that subject if it was to have no other meaning than that Gates should be at liberty to give him a portion of his estate if he so desired. Undoubtedly both parties understood those words as a promise to give the child some portion of the estate upon Gates' death; and the question is, what portion of the estate can it be fairly said Gates was thereby obligated to give? Does the language used specify with sufficient precision the share which Gates thereby became obligated to give to authorize a specific performance of it?

Assuming that the parties understood that the child was to have some portion of the estate, we are led naturally, I think, to the conclusion that he was to have such a share as a son would be entitled to *as an heir*, if the estate were divided among such children as Gates might have at the time of his death. The share which an heir would take suggests equality with other children; and, on the supposition that Gates was to give the child some share, the whole context fairly indicates that he was to give him such a share as he would be entitled to under the Statute of Descents.

In other words, though he could not literally make him his heir, he could, by will, give him the same share which, as his son, he would inherit, and such, I conclude, to be the fair construction of the language used. So construed, there is no difficulty in specifically performing it. Gates, at the time he died, had no children nor descendants living. The plaintiff, therefore, if he could have inherited, would, as an heir, have been entitled to the whole estate, and under the contract Gates should, by testamentary devise, have given him the whole. Not having done so, a decree may be made against those who have succeeded to his title, requiring them to make the proper conveyance. (*Colby v. Colby*, 81 Hun, 221.) Under this construction the contract did not require Gates to give all his property to the plaintiff to the exclusion of his own children; and, therefore, it is not obnoxious to the criticism that it was against public policy, and for that reason should not be enforced.

I, therefore, conclude that there is a cause of action set up in the complaint.

Upon the question as to whether two causes of action are improperly joined, I do not think that the amended complaint is obnoxious to that charge. The only cause of action set forth is the one based upon the contract. The averment that he was the only heir, and, therefore, entitled to the possession of the property, is the averment of a mere conclusion, and one that is clearly negatived by the facts which are elsewhere set forth. But if any cause of action other than that on the contract is set forth, it is one arising out of the same transaction, and hence the demurrer cannot be sustained upon that ground.

My conclusion is that the interlocutory judgment overruling the demurrer should be affirmed, with costs, and leave should be given defendants to answer over upon payment of the same within twenty days after notice of this order.

All concurred.

Interlocutory judgment affirmed, with costs, with leave to the defendant to answer over within twenty days after notice of this order, upon payment of costs.

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ALBERT BIRCH, Respondent, v. THE KAVANAUGH KNITTING COMPANY, Appellant.

*Sale — contract therefor by correspondence — when a test is provided for, a previous offer of warranty is not enforceable — a condition of the sale must in any event be complied with.*

In a correspondence relating to the purchase of some machines, the vendor offered to accompany the sale with a warranty that the machines would do certain things, but the vendee refused to make the purchase until it had had a practical test of the working of the machines, and an arrangement was made by which the vendee, before purchasing, was to have the opportunity of testing one of them for thirty days, and if, after such test, it was satisfied that the machine would operate as the vendor represented, then the purchase should be completed and the purchase price become at once due. If the machine did not so operate, the purchase was not to be completed and the machine was to be returned to the vendor, in whom the title was to remain during all the time of the test.

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At the expiration of the thirty days the vendee ordered two more machines, not notifying the vendor that the machine tested was not satisfactory nor returning it.

*Held*, that this action on the part of the vendee amounted to an acceptance of the machine, and that then for the first time the purchase was complete;

That no warranty accompanied the sale thus made.

*Semble*, that, even if the contract should be construed as a sale with a warranty, the further specific provision that the machine should be returned if the property proved, upon a test of thirty days, not to be as represented, obligated the vendee to make such return as a condition of his right to enforce the warranty.

APPEAL by the defendant, The Kavanaugh Knitting Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Saratoga on the 9th day of February, 1898, upon the verdict of a jury rendered by direction of the court.

*Edgar T. Brackett*, for the appellant.

*S. W. Russell, Jr.*, and *T. F. Hamilton*, for the respondent.

PARKER, P. J. :

The contract under which the defendant received the machines for the purchase price of which this action is brought, is contained in the letters which passed between it and the plaintiff; and no question as to what that contract was arose for the jury to determine. It was for the court to construe those letters and determine from them what the rights and obligations of the respective parties are.

If the contract so made was an absolute sale, accompanied with a warranty as to what the machines would do, then the defendant had the right to retain them, and to set off against the purchase price its damages arising from a breach of that warranty. And this would be so, even if the contract had provided that the defendant might return the machines and have the purchase price refunded if they proved not equal to the warranty. Such a provision would be but a cumulative remedy secured by the contract to the defendant. If the defendant failed to exercise that privilege within the time limited, it would operate as a waiver of the right to return, but would be no bar to its action for the damages suffered by the breach. (28 Am. & Eng. Ency. of Law, 827.)

But it appears from the correspondence in this case that no contract of sale, with warranty, was ever consummated between the parties.



It is plain that the defendant, notwithstanding the guaranty expressed by the plaintiff's agent, was not willing to make the purchase until it had had a practical test of the working of the machines. It was not willing to accept the offer made in plaintiff's letter of June fourteenth, for the reason that, under it, the blower and heater, which was to be furnished by a third party, must be purchased by the defendant absolutely, and even though the drying machine to be furnished by the plaintiff did not work satisfactorily. When, however, the plaintiff arranged so that both machines should be purchased upon the test provided for in that letter, the machine was received by the defendant and the test made in its own establishment.

By reference to plaintiff's letter of June fourteenth, to defendant's answer of June fifteenth, and its subsequent correspondence relative to seeing the machine at work, it is apparent that their contract was substantially to the following effect. Before the defendant purchased the machine, it was to have the opportunity of testing it for thirty days. If, after such a test, it was satisfied that it would operate as plaintiff represented it would, then the purchase might be completed, and the purchase price of \$300 would at once become due. If, however, the machine upon such test did not perform all that it was guaranteed to perform, then the purchase was not to be completed, but the machine must be returned to the plaintiff on board cars at Troy, N. Y. During all the time of the test, and until defendant elected to make the purchase, the machine belonged to the plaintiff. The title was in him, the possession only in defendant for the purpose of testing the machine. At the expiration of the thirty days the defendant, instead of notifying plaintiff that the machine was not satisfactory and returning it on board cars at Troy, as it had *contracted* to do in the event that the test was not up to the recommendation, ordered two more machines, the purchase of which was evidently made upon the result of the test.

This amounted to an acceptance of the machine, and then for the first time the purchase was complete.

But surely a purchase then completed was not made relying upon the plaintiff's warranty as to what the machine would do.

Clearly the plaintiff had no intention of giving a warranty that should accompany a sale so made. He never undertook that, after the defendant had demonstrated the machine's inability to perform

the work guaranteed, it might nevertheless retain the same and hold him in damages because it would not work. The sale was to be made only in the event that the defendant, after trial, was satisfied with the machine. Until satisfied by actual test, no sale was to be made. When *so* satisfied by actual test, no warranty was either relied upon or contemplated by either party.

The sale so made was one purely upon test and not upon a warranty.

Although the plaintiff did in exact terms guarantee that the machine would do certain things, which we must assume it would not do, yet under the final contract by which the sale was made, a practical test was substituted for such warranty, and each party evidently understood that defendant's reliance was to be upon the test and not upon the warranty. Under such circumstances it cannot be said that there was any contract of warranty accompanying the sale, and hence no cause of action for a breach thereof has accrued to the defendant.

But even if the contract could be construed as a sale with a warranty, it certainly contains the further specific provision that the machine should be returned if the property proved, upon a test of thirty days, to be not as represented. Here was something more than a mere privilege to the defendant that it might return the property; it was a positive agreement on its part that it would return it. Defendant now seeks to affirm that contract, to the extent of the sale and the warranty, but to utterly ignore that part of it which created the obligation on its part to return the property. This it cannot do. The general rule is stated in American and English Encyclopædia of Law (Vol. 28, p. 830) as follows: "The terms of the express contract of sale are to govern in all cases, and the vendee's right of action for a breach of the warranty does not exist until he has discharged the conditions precedent imposed by such contract."

In my judgment the ruling of the trial court was correct, and the judgment there entered should be affirmed.

All concurred.

Judgment affirmed, with costs.

GEORGE I. PAGE, Respondent, v. THE PRESIDENT, MANAGERS AND  
COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY,  
Appellant.

*Action for personal injuries—proof required to justify the allowance of damages  
for the expense of medical attendance past and future.*

In an action to recover damages for personal injuries the plaintiff is only entitled to nominal damages for the expense of medical attendance, in the absence of evidence showing what the medical attendance was and the amount of it; and where a claim is made for future pecuniary loss on account of expenses to be incurred for medical services, evidence should be given showing a reasonable certainty that such services will be needed, their probable duration, their character, their frequency and their value.

APPEAL by the defendant, The President, Managers and Company of the Delaware and Hudson Canal Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Broome on the 15th day of February, 1898, upon the verdict of a jury for \$7,000, and also from an order entered in said clerk's office on the 13th day of December, 1897, denying the defendant's motion for a new trial made upon the minutes.

*Lewis E. Carr* for the appellant.

*Wales & Wilber*, for the respondent.

PARKER, P. J.:

The plaintiff in this action seeks to recover against the defendant for a personal injury which, he claims, was caused by one of its employees negligently opening a switch and allowing an engine to back down against a car he was helping to unload. The defendant does not deny that it is liable to respond in damages to the extent of his injuries, but it claims that the verdict which was rendered against it upon the trial was grossly excessive, and that such verdict was rendered because of many erroneous rulings made upon the trial. A large amount of medical evidence as to the extent and effect of the injury, and as to the physical condition of the plaintiff, was given, much of it under the defendant's objection. One of the effects of the injury, which is specified in the complaint as "possibly a slight

concussion of the spine," upon the trial assumed a very prominent position, and was one of the principal reasons for claiming a large amount of damages. The verdict rendered was for \$7,000, and from the judgment entered thereon this appeal is taken.

In charging the jury as to the damages which, if they reached that question, they should allow to the plaintiff, the trial judge, among other things, said: "If injured upon that occasion it is your duty to award to him a sum sufficient to compensate him for proper and necessary medical expenses from the time he was injured until the present time; and if you believe from the evidence that there is a reasonable certainty that he will require medical attendance in the future, to compensate him for that prospective future expense." To this charge the defendant excepted, and, in connection with the exception, asked the judge to charge as follows: "That there can be no recovery for medical attendance in the past or in the future without some evidence as to what the medical attendance was and the amount of it." The judge declined to charge as requested, and the defendant excepted.

This charge refers to expense for medical attendance already incurred, and for such as might with reasonable certainty be expected to be incurred in the future.

Undoubtedly expense for medical attendance necessarily incurred is one of the elements of damage in a case like this, but it is the rule that "where the loss is pecuniary, and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only." (*Leeds v. Met. Gas Light Co.*, 90 N. Y. 26, 29.) "Where actual pecuniary damages are sought, some evidence must be given showing their existence and extent." (*Id.* 30.)

The reason of the rule is obvious. The speculations and guesses of a jury should not be substituted for facts which may be satisfactorily proven.

In the case at bar it appears that four different physicians had examined the plaintiff on different occasions. As to one of them, Dr. Walling, it appeared that, up to the time of the trial, he was still attending him more or less. As to the value of the services rendered by these gentlemen, I do not discover that there is any proof upon that subject, except that Dr. Walling's bill for services,

up to November 15, 1895, stating the charges therefor, was presented to the defendant, accompanied by a letter saying that such services were rendered upon the order of the superintendent of the company. There is no proof that the plaintiff had ever paid anything on account of the services of these several physicians, nor that the attendance of all of them was necessary.

As to medical attendance, and the expenses therefor which, with reasonable certainty, were to be expected in the future, while it appeared that the existing injuries under which plaintiff was suffering might become permanent, I do not discover any evidence showing that future medical services would be necessary, nor has any attention been called to any. No evidence showing the character of treatment, if any, that might reasonably be expected to be needed was given, nor the amount thereof.

As to the services already rendered, it is manifest that the jury were given no data upon which to fix the amount of expense that had been reasonably incurred by plaintiff on account of them. So, with reference to the medical services yet to be expected, no data whatever was given them upon which to base the plaintiff's compensation for the same. True, for such services, it could not be fixed with the accuracy that it could for those already rendered, but some proof, at least, might have been given by the expert witnesses who testified as to the permanent character of the injury, not only whether medical services would thereafter be needed, but also as to their character, their probable duration and value.

In *Staal v. Grand St. & Newtown R. R. Co.* (107 N. Y. 625) the plaintiff claimed damages for pecuniary loss resulting from diminution in his ability to labor in the future. Although there was no evidence in the case of his earning capacity, or of facts from which it might be inferred, the trial judge charged that they might take such loss into account as a distinct item of his damages. In reversing the judgment on account of error in the charge, the Court of Appeals say: "Before damages for future pecuniary loss can be awarded, there should be some proof such as a party can always give of his circumstances and condition in life, his earning power, skill and capacity. So much is left to the arbitrary judgment of jurors in this class of cases, that the rule which requires such proof of pecuniary loss should not be relaxed."

Such a rule is equally applicable to a claim for future pecuniary loss on account of expenses to be incurred for medical services. Some evidence to show a reasonable certainty that they will be needed, and their probable duration, their character, their frequency and their value, should be given.

The case being before the jury in that situation, even though the charge of the court, above quoted, correctly expressed the general rule on the subject, the defendant was entitled to the specific charge which he requested.

What medical attendance was rendered by Dr. Goodsell or by Drs. Orton or Hand? What did they do? What were the reasonable charges for what they did? It appears that each examined the plaintiff, but whether they advised as to his treatment, whether they were employed by him, and what was the amount and value of their services, nowhere appears. Now, if the jury had been instructed that they could allow compensation for medical services only when there was some evidence as to their character and amount, they might very well have left the last above named out of their estimate; and even the extent and value of the services of Dr. Walling, rendered after the last charge in his bill, were practically unknown to them, yet, as instructed by the charge and the refusal to charge, they may have deemed all those examinations proper and necessary and allowed a liberal sum as a compensation for the same. They had so very little information before them as to what amount the plaintiff had paid, or was liable to pay, to any or all of these gentlemen, that it was most important they should be informed of the rule which is stated in the defendant's request.

So with reference to the medical attendance which they might believe the evidence, with reasonable certainty, proved would be thereafter required, they should have been informed that some proof as to its character and amount should also have been furnished them before they could fix any compensation for the same.

It was most important that they should understand that such a limit upon their right to fix an amount existed. But the direct refusal to so charge was practically an instruction that no such limit did exist. The request correctly stated a rule of law applicable to this case, and the refusal to charge it was reversible error. (*Mitchell v. Turner*, 149 N. Y. 39, 45.)

But the exception to the charge itself seems to me to be well taken. I do not find in the case any evidence that there was a reasonable certainty that any future medical attendance would be required. That it would be is not necessarily inferred from the fact that the ailments under which plaintiff was then suffering would be permanent or would increase. And, further, there is not a single fact shown to indicate, if such attendance should be required, what would be its character or extent; not the slightest data upon which its value could be estimated. Any attempt to fix the amount of expenses so liable to be incurred would be the purest guesswork. For that reason the case was not one in which a jury could lawfully estimate and allow compensation for such "prospective future expense," and the instruction that they might do so was error. (*Gilbertson v. Forty-second St. R. Co.*, 14 App. Div. 294, 295, 296.) A mere exception is broad enough to cover an error of that description.

The verdict is a large one and is necessarily made up to a very large extent by the arbitrary judgment of the jurors. Manifestly we cannot say that it would have been the same had this error not been committed, and, therefore, we cannot conclude that it was harmless. (*Jefferson v. N. Y. E. R. R. Co.*, 132 N. Y. 483, 488; *Starbird v. Barrons*, 43 id. 200, 204.)

Without considering the many other exceptions presented, for the reasons above stated, the judgment must be reversed.

All concurred, except PUTNAM, J., not sitting.

Judgment and order reversed and a new trial granted, costs to abide the event.

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NOTE.—The rest of the cases of this department will be found in volume 35, App. Div.—[REP.]

# DECISIONS

IN

## CASES NOT REPORTED IN FULL.

### SECOND DEPARTMENT, OCTOBER TERM, 1898.

**Nathan Tisch, an Infant, by Marcus Tisch, his Guardian ad Litem Respondent, v. Isaac Hirsch and Benjamin Hirsch, Composing the Firm of Isaac Hirsch & Son, Appellants.**—Motion for reargument denied.—Motion for reargument. The opinion written upon the decision of the appeal in this case will be found in 32 Appellate Division, 635.

**PER CURIAM:** A re-examination of the record in this case makes it clear that the court misconceived the manner in which the bar was placed, when not in position, across the opening into the elevator shaft. Instead of its hanging downward into the shaft, it was raised and held in an upward position, and was let down from above into the hasp which held the unsecured end of the bar. If this mistake was controlling in the disposition of the case, it would follow that this motion be granted. We do not, however, so regard it. The duty devolved upon the plaintiff was to let the bar down into the hasp, and for the performance of this act no particular skill was required. As we observed in our former opinion: "It is evident that this bar, and the contrivance for holding it in place were quite simple, and quite easily operated. The plaintiff was a boy seventeen years of age, and it does not appear but that he was all in respects competent, in strength and otherwise, to handle the bar, and place it in the hasp." It is evident that as but little physical strength was necessary for this purpose, and as the hasp in which the end of the bar rested was open and visible, and the bar itself was easily guided, there was no excuse for bringing it down in such manner as to pass outside of the hasp; and this would be true whether the stationary end was held close to the side of the shaft by the screw which secured it, or whether it was sufficiently loose to enable the bar to pass outside of the hasp. Casual attention would enable the operator to guide the bar to its resting place. So guided it could not be made an instrument to draw plaintiff into the shaft. If the bar had not been fastened at either end, but was secured at both by hasps into which the bar was placed, there would be no excuse for the operator to pass the bar outside of the hasps and thereby precipitate himself into the shaft. The character of the fastening at the stationary end furnished no reason for the operator to assume that he might lean against it, or lower it in such manner that it would pass outside the hasp at one end, any more than he would be justified in passing it outside the hasps if both ends were unsecured. The sole thing to be done was to guide the end of the bar to its place in the hasp, and this could be done easily if the operator gave his attention to the accomplishment of that purpose, so long as the bar remained fast at its other end. In the character of this appliance we can find no duty resting upon the master to so secure the stationary end of this bar that it could not pass outside the hasp when let down. On the contrary, the appliance was simple; it

did not give way at its secured end, or in any other place. The plaintiff understood its use; he knew that he was to guide the loose end into the hasp, and he lowered it for that purpose; he did not perform his task properly, and, therefore, brought injury upon himself. We think the master failed in no duty, and that the accident was the result of negligence upon the part of the plaintiff. The motion for a reargument should be denied. All concurred.

**Frank J. Partridge, as Guardian ad Litem, etc., Respondent, v. Mary A. Kearns, as Administratrix, etc., Appellant.**—Motion for restitution granted and respondent ordered, within twenty days, to deposit in court, to the credit of the action, the sum hitherto paid out to him.

**Sidney Bell, Respondent, v. Moen's Asphaltic Cement Company, Appellant.**—Why is leave to appeal to the Court of Appeals necessary?

**John R. Drake, Appellant, v. The New York Iron Mine et al., Respondents.**—Motion denied. If the appellant can obtain relief, as to which we express no opinion, his application must be made in the first instance at the Special Term.

**Mary S. Timpson, Respondent, v. The New York, Lake Erie and Western Railroad Company and Others, Appellants.**—Motion to dismiss appeal denied. There is nothing before us to show that the order denying motion to change the place of trial was entered by consent. If such a consent was given, the respondent's remedy is to apply to resettle the order so that the consent shall be recited.

**In the Matter of the Application of the Westchester Trust Company to be Designated as a Deposit Bank.**—Order signed. Wilson Brown, Jr., appointed referee.

**Sarah Cook, Plaintiff, v. Joseph White et al., Defendants.**—As the appellant does not seek to reverse the order appealed from on the merits, but solely on the ground of lack of power of the court to entertain the motion after previous denial, it is not necessary that any case should be prepared on appeal. It is sufficient that so much of the record of the proceedings as shows the several actions taken by the court on the subject-matter, be certified to this division on appeal. Motion to dismiss appeal denied, without costs.

**James H. Crabtree, Respondent, v. William C. Otterson, Appellant.**—Motion granted by default.

**William F. G. Shanks, Respondent, v. Anthony Stumpf and Charles D. Steurer, Appellants.**—Order affirmed by default. All concurred.

**Helena I. Brown et al., Respondents, v. Mary A. Wadsworth et al., Appellants.**—Motion to resettle order denied.

**Richard Wilcock, Respondent, v. Edmund V. N. Heermance, Appellant.**—Motion for leave to appeal to the Court of Appeals denied.

**Nassau Bank, Appellant, v. The National Bank of Newburgh et al., Respondents.**—Motion for reargument denied.



Percival C. Smith, Respondent, v. Frank Allen, Respondent and Appellant, et al.—Motion to resettle order granted.

In the Matter of the Application of Ralph Raymond for Admission to Practice as Attorney and Counsellor at Law.—Application granted.

Martin Niland, Respondent, v. Walter Geer and Mary Geer, Appellants.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred, except Goodrich, P. J., and Bartlett, J., who voted to reverse and grant the motion in part.

Elizabeth Smith, Respondent, v. The Tenth and Twenty-third Street Ferry Company, Appellant.—Order affirmed on argument, with ten dollars costs and disbursements.

J. Adriance Bush, Respondent, v. George Bliss and Others, Defendants; William H. Sweny, Appellant.—Order modified, with ten dollars costs and disbursements to appellant, so as to provide that the discontinuance be granted on payment by the plaintiff of the defendants' disbursements and taxable costs, not including any extra allowance; and in default of such payment, within twenty days, the motion to discontinue is denied, with ten dollars costs. No opinion. All concurred.

William Gardam and Joseph Gardam, Appellants, v. John Healy, Respondent, and John Doe (the name John Doe being fictitious, defendant's real name being unknown to plaintiffs), Defendant.—Order affirmed, with ten dollars costs and disbursements, with leave to the appellants to apply, within twenty days, to the Special Term to amend the warrant of attachment and to set aside the order vacating the same. No opinion. All concurred.

Isidor Heyman, Respondent, v. The Eastern Brewing Company, Appellant.—Order modified so as to direct a bill of particulars as to sums expended for "medicines, liniments and medical and surgical treatment," and as modified affirmed, without costs. No opinion. All concurred.

Harry E. Colwell, Respondent, v. Frederick Tietig, Appellant.—Order reversed, with ten dollars costs and disbursements, to abide the event of the action, and motion to change place of trial granted, upon defendant delivering to plaintiff a stipulation that the case may be placed on the short cause calendar for trial, and in default of such stipulation then the order appealed from is affirmed, with ten dollars costs and disbursements. No opinion. All concurred, except Hatch and Woodward, J.J., dissenting.

Kathrina Naab, Appellant, v. David J. Stewart, Respondent.—Motion denied. (*Lyon v. M. R. Co.*, 142 N. Y. 298.)

In the Matter of the Petition of Edward W. West to Amend the Record of his Admission to Practice, etc.—Leave granted to take the oath of office and sign the roll.

Julius Manheim, Respondent, v. Michael Seltz, Appellant.—Motion for reargument granted.

William T. Smith and Richard C. Field, Appellants, v. George D. Ferguson & Co., Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

Morris Rosenfield and Others, Appellants, v. William J. Byrnes, Respondent.—Order reversed, with ten dollars costs and disbursements, and motion granted on the authority of *Prince v. Brett* (21 App. Div. 190), and proceedings remitted to the Special Term to fix the amount of fine to be imposed on defendant. All concurred.

In the Matter of the Application of Jacob G. Lazarus for Admission to the Bar. Application granted.

Arthur E. Gough, Appellant, v. Edgar B. Jewett, Respondent.—Motion for reargument denied.

Sidney Bell v. Moen's Asphaltic Cement Company.—Application denied. We are without power to grant leave, and leave is unnecessary if the plaintiff gives the stipulation prescribed by the Constitution, and subdivision 2, section 190 of the Code of Civil Procedure. As for the suggestion that the Court of Appeals cannot review the unanimous determination of this court, that there is evidence to sustain a finding of fact or verdict, it is sufficient to say, *first*, that this court has not found that the evidence sustains the verdict, but exactly the contrary; and, therefore, it does not fall within the provision of the Code; *second* if it did, this court would have no power to dispense with the constitutional provision limiting the power of the Court of Appeals on review.

Gerda Astrand, Respondent, v. The Brooklyn Heights Railroad Company, Appellant. Axel Astrand, Respondent, v. The Brooklyn Heights Railroad Company, Appellant.—Orders affirmed, with ten dollars costs in one case and disbursements in both, on authority of *Coster v. Greenvpoint Ferry Co.* (5 Civ. Proc. Rep. 146; *affd.*, *sub. nom.* *Custer v. Greenvpoint Ferry Co.*, 98 N. Y. 660.) All concurred.

Annie McCormack, Respondent, v. Nassau Electric Railroad Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.

Anna M. Fluhr, Respondent, v. The Manhattan Railway Company, Appellant.—Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulates to reduce recovery of damages to \$3,000., and extra allowance proportionately; and in case of such stipulation the judgment, as modified, is unanimously affirmed, without costs to either party. No opinion. Hatch, J., absent.

In the Matter of the Application of Samuel Salomon for Admission to Practice as an Attorney and Counsellor at Law in the State of New York.—Application granted.

In the Matter of the Application of the Westchester Trust Company to be Designated as a Deposit Bank.—Report of referee confirmed and order signed.

In the Matter of the Application of Joseph A. Joyce for Admission as an Attorney and Counsellor at Law.—Application granted.

William F. G. Shanks, Respondent, v. Anthony Stumpf and Charles D. Steurer, Appellants.—Motion to open default denied, with ten dollars costs, on the ground that by the record submitted to us it appears that the appeal from the order denying motion to resettle case is without merit. Motion to dismiss appeal from judgment denied, without costs.

Minnie Koehne, Respondent, v. New York and Queens County Railway Company, Appellant.—Motion for leave to appeal to the Court of Appeals denied.

In the Matter of the Petition of Richard Scott and Others, for an Order Requiring Clarence F. Birdseye, an Attorney and Counsellor of the Supreme Court, to Pay over Certain Moneys.—Order reversed and motion granted to the extent that the respondent, within twenty days, pay the petitioners' attorneys the sum of \$2,000; that it be referred to Hon. George G. Reynolds to take proof as to the value of the services and disbursements of the respondent and the amount of his lien, and report his opinion thereon, with the proofs, and that on the coming in and confirmation of the report of the referee such further order be made in the premises as may be just. No opinion. All concurred.

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**Mary S. Timpson, Respondent, v. New York, Lake Erie and Western Railroad Company and Others, Appellants.**—Order reversed and motion to change place of trial granted, without costs of motion or costs of this appeal. No opinion. All concurred.

**J. Victor Wilson and Charles D. Wilson, Composing the Firm of Wilson Bros., Respondents, v. Alonzo Cross and Frank E. Burch, Composing the Firm of Cross & Burch, Appellants.**—Order reversed on argument, with ten dollars costs and disbursements, and plaintiffs granted five days to serve answer in cross-action.

**The People of the State of New York ex rel. John A. James, Respondent, v. Mount Zion Lodge No. 1670, Grand United Order of Odd Fellows of the City of Brooklyn, Appellant.**—Order modified by reducing the award of costs to ten dollars, and, as modified, affirmed, with ten dollars costs and disbursements to respondent. No opinion. All concurred.

**John A. Schroeder, Respondent, v. George**

**Shrady, Appellant.**—Order affirmed, with ten dollars costs and disbursements to abide event of action. No opinion. All concurred.

**Harmon W. Cropsey and Lewis G. Mitchell, Respondents, v. Louis Hanneman, Appellant.**—Order affirmed on argument, with ten dollars costs and disbursements.

**Nellie Burns, Respondent, v. Philip J. Burns, Appellant.**—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

**In the Matter of the Judicial Settlement of the Account of Peter E. Henderson as the Executor of the Last Will and Testament of Stephen L. Henderson, Deceased.**—Application for leave to appeal to the Court of Appeals granted and order settled. Application to resettle order of reversal on appeal granted by adding the words "payable out of the funds of the estate."

**In the Matter of the Application of Benjamin Trapnell for Admission to Practice as Attorney and Counsellor at Law in the Courts of New York.**—Application granted.

## SECOND DEPARTMENT, NOVEMBER TERM, 1898.

**Emmett B. Waite and John T. Vermett, Respondents, v. The Trustees of the Estate and Property of the Diocesan Convention of New York, the Rector, Church Wardens and Vestrymen of St. Mary's Church, Beechwood, James W. Parr, William Kingsland, Defendants, and Dowah D. Tallman, Appellant.**—Judgment affirmed, with costs.—Appeal from a judgment entered upon a decision of the court at a Special Term held in and for the county of Westchester.

**HATCH, J.:** This action is brought to foreclose a mechanic's lien. Upon the trial it appeared that the defendant Tallman contracted to do the carpenter work upon the interior of an addition to St. Mary's Church, Beechwood. The said Tallman, in pursuance of his contract, contracted with the plaintiffs to furnish certain of the carpenter work and trimming. Under and in pursuance of this contract the plaintiffs furnished doors, frames, paneling and other material used in the building, in all of the value of about \$1,347.47. There does not appear to have been any substantial dispute between the parties as to the value or contract price of the materials furnished by the plaintiffs. It is claimed, however, that the plaintiffs, as a part of their contract, agreed to do certain carving, for which the defendant Tallman has paid or obligated himself to pay the sum of \$468.78. This sum he asserts should be deducted from the amount which the plaintiffs claim; also that there should be deducted from said claim the further sum of \$300 for refitting the work which the plaintiffs delivered and certain other small sums for cartage, etc. The main item in dispute is the carving. The complaint avers that the defendant Tallman contracted with the plaintiffs to furnish the interior woodwork and trimming for the said building, and further avers the performance of such contract. The defendant Tallman testified upon this subject: "I saw the panel work after it was completed and in the church, and, aside from the carving, it was all completed according to the plans and specifications. That was done by the plaintiffs in this action." The court was justified, therefore, in finding that the plaintiffs performed their contract, unless the carving formed a part of it. It stands admitted that the de-

fendant Tallman has paid the carving bill or obligated himself to pay therefor in the amount which he seeks to counterclaim; and, if it be within the contract, then the plaintiffs are compelled to suffer a deduction to that amount. Upon this subject there is some dispute in the testimony. It is admitted that the plans and specifications show that there was to be the interior carving which was done. It also appears that both Tallman and the plaintiffs understood but little about the carving which was required, and the architect of the building testified: "If they had never seen the carving and never did any work for us, it would be necessary to ask us what kind of carving was contemplated." It is, therefore, evident that, while the plans and specifications indicated what carving was to be done, yet, in order to have a fair understanding of its nature and extent, it was necessary that the plans and specifications should be explained by the architect who made them, or by some person who fully understood their meaning. Upon this subject the plaintiff Waite testified that Tallman brought the plans and specifications to the office and asked for figures upon the work. He said: "I said to Mr. Tallman, after looking over the details, 'No one can tell how to figure on carving without any shading.' He said to me that this carving will be left to the carver, Mr. Blauvelt, as I have seen him and talked to him about it." And this witness further states that subsequently Tallman came in; asked for a price upon the panel work, which he gave him at the price charged for in the bill, and he added that he made no estimate for carving upon such work. This was a Gothic panel, and the architect testified that carving was required upon it as shown in the plans and specifications. Vermett testified that nothing was said about carving upon the panel work, and that the plaintiffs were not to do it. Erickson, a carpenter in the plaintiffs' employ, testified that he had a conversation with Tallman, when the plaster-paris models for the carving came to the factory, and he asked who paid the expense. Tallman replied "that he and the builder were going to take it between them." \* \* \* He said it was going to be cheap carving and going to be left with the carver." Waite

also testified that the only carving he was to do, or which he contracted to do, was some carving about the casings and the doors, which was estimated by the carver at fifty dollars. The defendant Tallman testified that he was not a carver, and could not tell as to the exact marks, but supposed a carver could. Waite "said it was a difficult matter for him to take the plans and specifications and determine from them what the carving was to be done \* \* \* I did state to Waite and Vermett that Mr. Blauvelt was the man to settle that question, but that did not make it so." He further testified that the plaintiffs were to do the carving, and that he did not agree that the matter should be referred to Blauvelt. The plaintiffs gave further testimony tending to show that they applied to Blauvelt as directed by Tallman, and that he estimated the carving to be done at fifty dollars. Blauvelt testified that he made such estimate. Subsequently Blauvelt saw the architect and learned that different carving was required, and ascertained that it was to be made from plaster paris models, and was quite intricate in character. This information was imparted to the plaintiffs, and they refused to go on with the work if they were expected to do such carving. This matter led to some negotiations between the parties, and the defendant Tallman wrote that he had seen the builder, and that he would do what was right with him about the extra carving, and that he would do the same with the plaintiffs, and that plaintiffs had better hurry along with the work and gain the favor of those who were to pay. We think that this testimony, and much to which reference is made, authorized the court to find either one of two propositions: That the plaintiffs by their contract never undertook to do the carving upon the Gothic panel work, but were only to make the panels and do the carving about the door; that the defendant Tallman left it with Blauvelt to determine the extent and character of the carving, and that Blauvelt's estimate of the cost of that work was binding upon the defendant Tallman, or that the parties were misled as to the extent of the carving to be done, and that defendant Tallman thereafter waived the performance of the contract in this respect. Either view authorized the court to render the judgment which it did. In this view the issue was within the pleading as that averred the making and execution of the contract. Besides, the defendant Tallman raised no such question by his objections. The question did not necessarily arise upon the making of a new contract. The evidence was directed to the question of what the contract was, and nothing was said that the contract as established was not the contract averred in the pleading. While the defendant Tallman might have insisted that there was no averment of waiver, in respect of the carving, if that were the question, he took no such objection, and nothing which was stated in the objection was calculated to call such question to the attention of the court. It would not, therefore, be available upon this appeal. So far as the question of allowance to the defendant Tallman for extra work is concerned, a question of fact was presented, and this court, under the evidence, is concluded thereby. We find no error in the record prejudicial to the defendant Tallman, and, therefore, conclude that the judgment should be affirmed. All concurred.

Charles Henry Dietz, Respondent, v. Edward F. Leber and Louis Meyer, Appellants.—Order resettled by adding thereto: "And defendants' motion for bill of particulars

granted to the extent indicated in the opinion."

Catherine Rich, as Administratrix, etc., of Thomas Adlum, Deceased, Respondent, v. Pelham Rod Elevating Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.

Charles P. Robinson, as Committee, etc., of Jeremiah Cole, Respondent, v. Ida M. Smith and Others, Defendants; William S. Estelle, Appellant.—Judgment affirmed, with costs. No opinion. All concurred.

Milton T. Woolley, Respondent, v. Joseph P. Puels, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred.

Nora Mary Woodcock, Appellant, v. Adler Veneer Seat Company, Respondent.—Order affirmed, without costs. No opinion. All concurred.

William C. Lorey and Others, Respondents, v. The City of New York, Appellant.—Judgments and orders appealed from affirmed on default. All concurred.

The People of the State of New York ex rel. J. Esler Eckerson and Others, Respondents, v. Charles H. Zundel and Others, as Assessors and Trustees of the Village of Haverstraw, and Another, Appellants.—The defect for which the amendment granted by the Special Term permits the tax roll to be assailed, if it exists, renders the assessments void on their face, and under the authority of *The People ex rel. D. & H. C. Co. v. Parker* (117 N. Y. 86) a certiorari, under the law of 1880, should not issue to relieve from such an error. Orders reversed, with ten dollars costs in one case and disbursements in all and motion denied, with ten dollars costs. All concurred.

Leopold Ehrmann, as Administrator, etc., of Minnie Ehrmann, Deceased, Respondent, v. Nassau Electric Railroad Company, Appellant.—Judgment and order affirmed, with costs. No opinion. All concurred, except Goodrich, F. J., who dissented solely on the ground that the verdict was excessive.

John Schayer, Plaintiff, v. New Haven Steamboat Company and Michael Donovan, Defendants.—Exceptions overruled and judgment unanimously directed for defendants on dismissal of the complaint at Trial Term, with costs. No opinion.

Sarah Cashmaker, Respondent, v. Nassau Electric Railroad Company, Appellant.—Order denying motion for a new trial on newly-discovered evidence reversed, and new trial granted, upon appellant paying respondent, within ten days, the trial fee and disbursements of the trial and one-half of the extra allowance granted by the court, in which case the appeal from the judgment and order is dismissed, without costs, and the judgment vacated. If the defendant fails to make such payment within the time aforesaid, then judgment and orders unanimously affirmed, with costs. No opinion.

Jacob M. Lacs, an Infant, by Samuel Lacs, his Guardian ad Litem, Respondent, v. James Everard's Breweries, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.

In the Matter of the Petition of the Brooklyn Elevated Railroad Company, Appellant, Relative to Acquiring Title to Real Estate or a Right of Way on Myrtle Avenue in the City of Brooklyn and County of Kings, v. William F. C. H. Voss, Owner of Parcel No. 10, Respondent, and Benjamin D. Silliman, Respondent.—Order affirmed, with ten dollars costs and disbursements. No opinion. All concurred.

Adolf S. B. Schramm, Respondent, v. The Brooklyn Heights Railroad Company and The Consolidated Ice Company, Appellants.

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- Judgment and order unanimously affirmed, with costs. No opinion.
- Joseph Meyerrose, Respondent, v. The Brooklyn Heights Railroad Company, Appellant. —Judgment and order reversed and new trial granted, costs to abide the event, unless, within twenty days, plaintiff stipulates to reduce recovery of damages to \$3,500 and extra allowance proportionately. In case of such stipulation, the judgment, as modified, is unanimously affirmed, without costs of this appeal to either party. No opinion.
- Edward Carll, Respondent, v. Long Island City, Appellant, and thirteen other cases. William Heiberger, Respondent, v. Long Island City, Appellant, and three other cases. —Judgments affirmed, with costs, on opinion of Woodward, J., in *Koelsch v. City of New York* (ante, p. 98). All concurred.
- Joseph Stern, Respondent, v. The City of New York, Appellant. —Judgment affirmed, with costs, on opinion of Woodward, J., in *Koelsch v. City of New York* (ante, p. 98). All concurred.
- David Mayer and Another, Appellants, v. William Friedman (sued herein as John Doe, the name John Doe being fictitious), Respondent. —Motion for leave to appeal to the Appellate Division denied.
- Michael Raffael, Appellant, v. Thomas Quirk and the City of Yonkers, Respondents. —Order granting new trial modified, so as to require, as condition of the new trial, that the defendant, within twenty days, pay to the plaintiff costs as taxed in the judgment roll, and, as modified, affirmed, without costs of appeal to either party. No opinion. All concurred.
- Joseph H. Sweeney, Appellant, v. Maria E. Kear, Respondent. —Judgment affirmed, with costs. No opinion. All concurred.
- Henry J. Creighton and Frederick W. Janssen, Respondents, v. Russell W. Benedict, Appellant. —Judgment and order affirmed, with costs. No opinion. All concurred.
- Hannah Tracey, Respondent, v. Mary E. Lynch, Appellant. —Judgment and order unanimously affirmed, with costs. No opinion.
- Maddalena Capparella, Respondent, v. The Brooklyn Heights Railroad Company, Appellant. —Judgment and order unanimously affirmed, with costs. No opinion.
- In the Matter of the Application for the Probate of the Alleged Will of Thomasine Morris, Deceased. —Decree of surrogate affirmed, with costs. No opinion. All concurred.
- Asa A. Trenchard, Appellant, v. William J. Wiley, as Assignee of A. D. F. Randolph & Co., for the Benefit of Creditors, and Another, Respondents. —Judgment affirmed, without costs. No opinion. All concurred.
- Angelina A. Henderson, Respondent, v. Maria H. N. Bartlett, as Executrix, etc., of Edward B. Bartlett, Deceased, Appellant. —Motion for reargument denied. Goodrich, P. J., not sitting.
- The People of the State of New York ex rel. William R. Fleming, Respondent, v. William Dalton, Commissioner of Water Supply of the City of New York, and Another, Appellants. —Order appealed from reversed, with ten dollars costs and disbursements, and motion denied, with ten dollars costs, solely on the authority of *People ex rel. Leet v. Keller* (31 App. Div. 243). All concurred.
- Thomas Donlon, Respondent, v. William J. Dilthey, Appellant, Impleaded with Others. —Order appealed from affirmed, with ten dollars costs and disbursements. No opinion. All concurred.
- Catherine Rich, as Administratrix, etc., of Thomas Adlum, Deceased, Respondent, v. Pelham Hod Elevating Company, Appellant. —Application for leave to appeal to the Court of Appeals denied.
- In the Matter of the Application of Ervine D. York for Admission to the Bar. —Proof should be furnished that no application has been made in any other department.
- In the Matter of the Admission of George Cook as an Attorney and Counselor in the Courts of the State of New York. —Proof should be furnished that no application has been made in any other department.
- In the Matter of the Application of the Port Chester Street Railway Company for the Appointment of Commissioners, etc. —Application granted. Joseph A. Burr and Nathaniel H. Clement of the borough of Brooklyn, and William H. Wright of Somers, county of Westchester, appointed commissioners.
- Abraham D. Covert, Respondent, v. The City of Brooklyn, Appellant. —Judgment affirmed, with costs. No opinion. All concurred.
- Joseph Tate, as Receiver of Round Island Park, Appellant, v. Vasco P. Abbott and Edward H. Neary, Respondents. —Order affirmed, with ten dollars costs and disbursements to abide the event of the action. No opinion. All concurred.
- John P. Hawkins, Respondent, v. Pelham Electric Light and Power Company, Appellant. —Order affirmed on argument on opinion in *Zeimer v. Rafferty* (18 App. Div. 397).
- Patrick Martin, Respondent, v. Nassau Electric Railroad Company, Appellant. —Order affirmed on argument, without costs, and with leave to the appellant to renew application.
- James L. Howard, Respondent, v. Port Chester Street Railway Company, Appellant. —Order modified on argument, so as to limit the injunction to the part of the street in front of the plaintiff's premises, with ten dollars costs and disbursements to the appellant.
- James M. Field, Respondent, v. Port Chester Street Railway Company, Appellant. —Order affirmed on argument, with ten dollars costs and disbursements to the respondent.
- Sarah Cook, Respondent, v. Joseph White and Others, Respondents; Thomas Geary and Annie Geary, Infants, Appellants, Impleaded with Others. —Order affirmed, without costs. No opinion. All concurred.
- The People of the State of New York ex rel. John Harvey, Appellant, v. Henry H. Cannon, as President of the Village of Irvington, and John O'Connor and Others, as Trustees of the Village of Irvington, Respondents. —We are of the opinion that the Special Term was required to decide the rights of the regulator, even though William H. Winnie, who is alleged to be the present incumbent of the office, was not a party to the proceeding, and that its order denying such determination until said incumbent was brought into the proceeding, was erroneous. The final order is reversed, and proceedings remitted to the Special Term for decision and judgment, costs to abide the final award of costs. All concurred.
- In the Matter of the Petition of Richard Scott et al. —Motion for resettlement denied. But unless the petitioners, within a reasonable time after the payment required by the order, return to the respondent the check alluded to in the moving papers, or sufficiently account for its non-production, the respondent may move for summary relief in this proceeding.
- Leonora Linehan, Respondent, v. The Coney Island and Brooklyn Railroad Company, Appellant. —Judgment and order reversed and new trial granted, costs to abide the event, unless within twenty days plaintiff stipulates to reduce recovery of damages to

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\$2,500, and extra allowance proportionately; and in case such stipulation is made, the judgment, as modified, is unanimously affirmed, without costs to either party. No opinion.

Anne Murray, Respondent, v. The Village of Port Jervis, Appellant.—Judgment and order unanimously affirmed, with costs, on authority of *Keane v. Village of Waterford* (130 N. Y. 188).

Ellsworth C. Smith, Respondent, v. Rose Ella Smith, Appellant.—Judgment affirmed. No opinion. All concurred.

Ella Rehage, Respondent, v. The Brooklyn Heights Railroad Company, Appellant.—Judgment and order unanimously affirmed, with costs. No opinion.

James W. Blake, Appellant, v. John B. Reilly, Respondent.—Judgment affirmed on argument, with costs.

### FIRST DEPARTMENT, NOVEMBER TERM, 1898.

Nathan Hofheimer, Appellant, v. American Distributing Company, Respondent.—Judgment affirmed, with costs.—Appeal from judgment entered upon report of a referee.—PATTERSON, J.: Issues of fact only are involved in this appeal. The action was brought to recover the value of services alleged to have been rendered by the plaintiff to the defendant in procuring contracts to be made by the firms of Steinhardt Brothers & Co. and Engel, Heller & Co. for the purchase of merchandise, the allegations of the complaint being that the defendant employed the plaintiff to procure the contracts to be made and that the services were rendered pursuant to the employment. The defendant denies these allegations, and the simple question is whether the plaintiff has established his case by a preponderance of proof. Upon conflicting testimony the referee has decided the issues of fact adversely to the plaintiff, and, upon a careful examination of all the evidence appearing in the record, we see no reason for differing with him in his conclusion. The principal facts may be briefly stated. There were three corporations or business concerns engaged in selling or distributing alcohol and spirits. The Distilling and Cattle Feeding Company was one, the defendant, the American Distributing Company another, and the third was a concern called the Independent Distributing Company. It would appear that the Cattle Feeding Company was engaged in the business of distilling; that the American Distributing Company sold the products of the Cattle Feeding Company in eastern territory upon what was called a rebate system, that is to say, purchasers would deposit with the defendant seven cents a gallon in addition to the agreed price of the merchandise, and, at the expiration of certain stated periods, such purchasers would have returned to them the amount of their deposit in excess of the purchase price. The defendant's business was conducted entirely upon that plan. It also appears that there were important dealers in spirits and alcohol who would not transact business upon that basis, and it was desired to secure the trade of such persons. Among them were the two firms of Steinhardt Brothers & Co., and Engel, Heller & Co. Those interested in the American Distributing Company and the Cattle Feeding Company were, to a large extent, the same parties, and among others so situated was a Mr. Terrell. He was the vice-president of the defendant. The American Distributing Company was incorporated in the fall of 1891. In order to attract purchasers of the Cattle Company's products, who would not deal on the rebate system, the scheme was devised of conducting business under the name of the Independent Distributing Company, and that business was put in the charge of a Mr. Quinn as manager. The negotiations concerning

the establishment of the business of the Independent Distributing Company were had at the office of the defendant, and the contention on the part of the plaintiff is that this Independent Company or Mr. Quinn, doing business as the Independent Distributing Company, was only an agency or branch of the defendant's business, and that its contracts were contracts of the defendant. The plaintiff did procure contracts to be made to purchase goods by the firms of Steinhardt Brothers & Co., and Engel, Heller & Co., but those contracts were made in terms with the Independent Company; they are in writing and appear in the record. They were signed by the Independent Distributing Company, per L. H. Quinn, manager, and also by the contracting firms respectively. The service of the plaintiff in negotiating these contracts is fully proven, but he failed to show that the defendant employed him to render that service. His own statement is that the first person with whom he had any conversation regarding the business of Steinhardt Brothers & Co. was Mr. Terrell, and that at the first interview he had with Mr. Terrell, the latter wanted to know whether the outside houses could be brought into the American Distributing Company, and he told him that it could be done; that he knew Mr. Heller, and that he also knew Steinhardt Brothers & Co., and that possibly an arrangement could be made, and he then proceeds to say that he took two or three months to convince those people that it would be to their mutual advantage to buy their goods from the American Distributing Company. He also swears that he reported to Mr. Terrell what could be done, and that he was told to go ahead and make the contracts with the Independent Distributing Company, he, Terrell, saying that "that would be the same, as they were buying without rebates, and the American Distributing Company was selling only with rebates." He further avers that there never was any question with Mr. Terrell about the Independent Distributing Company, and that it never came up until the closing of the contracts, and it was not until his negotiations were ended that it was stated that the contracts were to be made in name with the Independent Distributing Company. Mr. Terrell flatly contradicts the testimony of the plaintiff in this regard. He testified that he told the plaintiff that the Distilling and Cattle Feeding Company wanted to extend their business in the east, and that they wanted the Engel & Heller trade and also the Steinhardt trade, and that the plaintiff said his relations with both these firms were such that he would be able to bring about an arrangement. Mr. Terrell also swears that he did not tell Mr. Hofheimer that he was acting for the American Distributing Company, and that he did not ask Mr. Hofheimer to get a contract for the American Distributing Company.

uting Company, and that he never told anybody that he had employed Hofheimer for the American Distributing Company. Upon the initial fact in the negotiations respecting the employment, the referee has accepted the version of Mr. Terrell, and we think, on the whole case, he was authorized so to do. There is nothing to corroborate the plaintiff with respect to this particular topic of evidence. The plaintiff also testified that Mr. Curtis, the president of the defendant, knew of his employment and of the service he had undertaken for the defendant; but Mr. Curtis says that he never had any knowledge or understanding that the plaintiff was acting in the negotiations with the two firms mentioned on behalf of the defendant. Concerning the contention of the plaintiff that the Independent Distributing Company, or Mr. Quinn, was a branch of the defendant, or that Quinn was merely an agent of the defendant or of an undisclosed principal, and that the services rendered by the plaintiff were real y for the benefit of the defendant under the name of the Independent Distributing Company, and that his employment emanated from the defendant, the referee considered, on all the evidence, that the Independent Company was a branch of the Distilling and Cattle Feeding Company, started by Quinn or managed by him, and was not connected with the defendant, except as purchasing some goods from it or having a transaction with it confined to one or two items drawn into the case by the relation of Engel, Heller & Co. upon some antecedent contract with the Nebraska Distilling Company, which are not involved in any direct question connected with the action. Mr. Quinn, who was the secretary of the defendant at one time, says that he was the manager of the Independent Distributing Company and that the American Distributing Company had in fact nothing to do with it and that the Independent Distributing Company was in the interest of the Distilling and Cattle Feeding Company; that the Independent Company was organized by one Greenhat and by Mr. Terrell at the office of the defendant and at or after a regular meeting of that company, but from certain transactions had at meetings of the American Distributing Company and certain resolutions referred to by the referee in his opinion, the inference is sought to be drawn that the Independent Company was instituted by and in the interest of the defendant and that its business was the business of the defendant. But the purpose and object of those resolutions is explained in the testimony and nothing need be added to the comments of the referee upon them. It would appear from the testimony that the establishment of the Independent Company was a matter of discussion at a meeting of the directors of the defendant and that the proposition came from the officers of the Distilling and Cattle Feeding Company and that the project was opposed by some of the directors of the defendant; that it was finally acquiesced in, not as establishing a branch business of the defendant, but as the creation of an agency for the sale of the Cattle Company's products. The attitude of the plaintiff after the contracts were made with the Independent Company by the two purchasing firms clearly indicated that he was himself uncertain upon whom liability to him rested. He sued the Cattle Feeding Company upon this same claim, but was induced to discontinue his action upon statements of Quinn that this defendant was the responsible party. Mr. Quinn had no authority to make these

representations for the defendant, and nothing that he could say would change the relation existing between the plaintiff and his employer, whoever it was. The whole drift of the testimony shows that it was not the defendant, but strongly tends to indicate that it was the Distilling and Cattle Feeding Company. The defendant cannot be held responsible because Mr. Quinn may have diverted the plaintiff from pursuing his proper action. Upon the whole case it is quite apparent that the plaintiff failed to sustain his cause of action and that the judgment appealed from must be affirmed, with costs. Van Brunt, P. J., O'Brien, Ingraham and McLaughlin, J.J., concurred.

John Townshend, Appellant, v. Eleanor Keenan and Others, Respondents.—Order of April 20, 1898, as amended by order of May 2, 1898, and order of April 25, 1898, reversed, with ten dollars costs and disbursements of appeal, and defendant's motion to extend time for payment of costs referred to in order of March 14, 1898, denied. Order of March 14, 1898, modified by striking therefrom the words "within thirty days from the date of the entry of this order," and as thus modified affirmed, without costs of appeal.—*PER CURIAM*: The order of March 14, 1898 (misprinted 1896), related back to the date when the defendants' motion for a new trial was argued and submitted. That was within the three years. The order, however, should simply have followed the statute. It must, accordingly, be modified by striking therefrom the words "within thirty days from the date of the entry of this order," and as thus modified affirmed, without costs of the appeal from such order. The order of April 20, 1898, as amended by the order of May 2, 1898, and the order of April 25, 1898, are reversed, with ten dollars costs and disbursements of the appeal (one bill) and the defendants' motion to extend the time for the payment of the costs referred to in the order of March 14, 1898, denied. Present.—Van Brunt, P. J., Barrett, Rumsey, Ingraham and McLaughlin, J.J.

John Townshend, Appellant, v. Eleanor Keenan and Others, Respondents. Same v. Same. Same v. Same. Same v. Same.—Order of April 20, 1898, as amended by order of May 2, 1898, and order of April 25, 1898, reversed, and defendant's motion to extend time for payment of costs referred to in order of March 14, 1898, denied. Order of March 14, 1898, modified by striking therefrom the words "within thirty days from the date of the entry of this order," and as thus modified affirmed, without costs of appeal. (See *Per Curiam* opinion in *Townshend v. Keenan*, ante).

Olivia G. Bates, Respondent, v. Louise Faul Violet and Others, Appellants, Impleaded with Others.—Motion denied, without costs.—Motion for reargument.—

*PER CURIAM*: There is no occasion for a reargument of this case. The expression contained in the opinion of the court (33 App. Div. 436) respecting the interests as ascertained being subject to a dower right of Mrs. Violet, was based upon the understanding that John B. Violet died in September, 1897, and Mrs. Hoyt in June, 1897. If Mr. Violet died in 1891 and before Mrs. Hoyt, what was said in the opinion respecting the dower of Mrs. Violet must not control on the retrial of the action which has been ordered. It has been suggested that there is no proof concerning Mr. Violet's being a resident of France at the time of his second marriage, and that the stipulation referred to in the opinion of the court was modified. Such modification was made by a subsequent

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stipulation which was not overlooked in the decision of the appeal. The referee found that John B. Violet became a citizen of the United States in 1856, but the question respecting the adoption of his first child, born in France, turned upon something else than that single finding of the referee. The authenticated documents of the official proceedings in France, which were in evidence before us, contain the declaration that Violet was a landed proprietor residing in France. Motion for reargument denied, but without costs. Present—Van Brunt, P. J., Rumsey, Patterson and Ingraham, JJ.

**The People of the State of New York ex rel. Frederick Strauss, Respondent, v. Louis Leubischer, Appellant.** Clarence H. Venner, Appellant.—Order affirmed, with ten dollars costs and disbursements.—Appeal from order discharging the relator upon a writ of habeas corpus.

**PER CURIAM:** For the reasons given in the opinions of Ingraham and Rumsey, JJ., in *People ex rel. MacDonald v. Leubischer*, herewith handed down (*ante*, p. 577), the order appealed from should be affirmed, with ten dollars costs and disbursements. Present—Barrett, Rumsey, Ingraham and McLaughlin, JJ.

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**The People of the State of New York ex rel. John J. Tucker, Relator, v. Robert A. Van Wyck, Mayor of the City of New York, Respondent.**—Proceedings affirmed and writ dismissed, with costs.—Certiorari to review action of respondent in removing the relator as one of the aqueduct commissioners, appointed under the provisions of chapter 584 of the Laws of 1888.

**INGRAHAM, J.:** For the reasons stated in the case of *The People ex rel. Green v. Van Wyck*, decided herewith (*ante*, p. 573), the proceedings are affirmed and the writ dismissed, with costs. Van Brunt, P. J., Barrett and McLaughlin, JJ., concurred; Rumsey, J., dissented.

**34 630**  
**159a 509**  
**The People of the State of New York ex rel. Henry W. Cannon, Relator, v. Robert A. Van Wyck, Mayor of the City of New York, Respondent.**—Proceedings affirmed and writ dismissed, with costs.—Certiorari to review action of respondent in removing the relator as one of the aqueduct commissioners, appointed under the provisions of chapter 584 of the Laws of 1888.

**INGRAHAM, J.:** For the reasons stated in the case of *The People ex rel. Green v. Van Wyck*, decided herewith (*ante*, p. 573), the proceedings are affirmed and the writ dismissed, with costs. Van Brunt, P. J., Barrett and McLaughlin, JJ., concurred; Rumsey, J., dissented.

**David Williamson, Respondent, v. Continental Filter Company, Defendant, and Henry B. Anderson, Appellant.**—Judgment affirmed, with costs on the opinion of the court below. Present—Van Brunt, P. J., Patterson, O'Brien, Ingraham and McLaughlin JJ.—The following is the opinion of the court below: **HISCOCK, J.:** The plaintiff is the holder and in possession of and produces upon the trial of this action a certificate transferring to him absolutely and as the unqualified owner sixty-nine shares of the capital stock of the above-named defendant company, and seeks to compel said company to transfer said stock to him upon its books. The defendants, and principally, it appears, the defendant Anderson, dispute his right to have said stock so transferred, claiming that he holds the same as security and not as an absolute owner. A somewhat involved explanation has been offered by the evidence of the defendants to sustain such theory of security or qualified ownership. After considering

the same, however, in the light of plaintiff's evidence contradicting such theory and in the light of the *prima facie* right which plaintiff has upon the face of the certificate to have it transferred to him, I am of the opinion that the latter has established his right to the relief claimed and that he should have judgment compelling such transfer, etc. Findings or decision and judgment in accordance herewith, with costs against both defendants, may be prepared by plaintiff, and, if not satisfactory in form to defendants, they may submit amendments.

**Mary A. Connolly as Administratrix, etc., of Joseph Connolly, Deceased, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.**—Reargument ordered.

**The People of the State of New York ex rel. John H. Daniels, Relator, v. Henry S. Kearny, Commissioner of Public Buildings, Lighting and Supplies, Respondent.**—Writ dismissed and decision of commissioner affirmed, with costs. No opinion.

**Cornelius M. Breen, Respondent, v. William F. Lennon and Others, Appellants; Alberene Stone Company and Others, Defendants; Lawrence Lagerstedt and Knut Ostergren, Respondents.**—Judgment affirmed. No opinion.

**Edward V. Thebaud and Others, Respondents, v. The Phenix Insurance Company, Appellant.**—Judgment affirmed, with costs on authority of *Thebaud v. Great Western Insurance Co.* (155 N. Y. 516). No opinion.

**In the Matter of the Application of the Board of Education, etc., Relative to Acquiring Title, etc. (Claimants, Denman v. Hamilton et al.).**—Motion to confirm report of referee granted, for the reasons stated in opinion of the referee contained in his report.

**Ann Jane Sullivan, Appellant, v. John W. Clark and Others, Respondents.**—Judgment affirmed, with costs. No opinion.

**Cornelius W. H. Elting, Respondent, v. Charles W. Dayton, Appellant.**—Order affirmed, with ten dollars costs and disbursements. No opinion.

**In the Matter of the Application of Charles Haber, Appellant, for a Peremptory Writ of Mandamus against Bernard J. York and Others, Police Commissioners of the Municipal Police Department of the City of New York, Respondents.**—Order affirmed, with ten dollars costs and disbursements, on authority of *People ex rel. Golden v. Roosevelt* (34 App. Div. 17).

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**Mary E. Learned v. The Mayor, etc.**—Motion granted, with ten dollars costs.

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Ora C. B. Jacobs, Respondent, v. Benjamin Altman, Appellant.—Judgment affirmed, with costs. No opinion.

Catherina Cook, Respondent, v. The Metropolitan Elevated Railway Company and Another, Appellants.—Judgment modified by reducing amount awarded for fee damage to \$1,000 and for rental damage to \$75 a year, and as modified affirmed, without costs to either party. No opinion.

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William H. Harvey v. Nicoll & Roy Company.—Motion granted, without costs.

Samuel Parker v. Lancashire Insurance Company.—Motion granted, with ten dollars costs.

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In the Matter of Twelfth Ward Park. (Re Barilati.)—The report cannot be amended. Reference must be ordered on notice to all parties.

In the Matter of Twelfth Ward Park. (In re Scangarella et al.)—The award being to unknown owners, the city is not liable for interest. The report in other respects confirmed.

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Standard Fashion Company v. Siegel-Cooper Company.—Motion granted upon payment of taxable costs and disbursements.

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# PROCEEDINGS

IN THE

## Appellate Division of the Supreme Court

### FOURTH DEPARTMENT

UPON THE DEATH OF

Hon. MANLY C. GREEN, Associate Justice

NOVEMBER 22, 1898.

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By the Honorable GEORGE A. HARDIN, Presiding Justice :

Since the adjournment of the last sitting of this court on the seventh of October, death has removed one of the Associate Justices.

On the tenth of October at his home, in the presence of his wife, he fell into that sleep that knows no earthly awakening. He died without an admonition that the end was near, peacefully and without physical suffering. The knowledge of his departure was communicated to his associates, and those who could reach the city of Buffalo attended the last rites over his mortal remains, and with his colleagues in the Eighth District and a large concourse of the Bar of Erie and other counties, accompanied his family and mourning friends to St. Mary's Church on the Hill. There the sacred and solemn services for the dead were rendered in the church of his affection, and from there he was carried forth and laid to rest in his lot in the beautiful churchyard amid the tears and sorrows of the large silent throng that gathered round his grave.

When in the fall of 1895, in the designation of the members of this court, Governor Morton assigned him as one of the Associate Justices, the Bar and Bench of the Eighth District, as well as other parts of the department, rejoiced at and approved of his appointment.

In January of 1896 we came together in the discharge of the duties imposed upon us, and ever since have been intimately asso-

ciated in the performance of the arduous duties of the court, organized to review the decisions of judicial tribunals of a department having nearly 1,800,000 people.

As an associate Judge GREEN was endeared to us. He was cheerful, companionable and thoughtful; industrious and vigilant and thorough in the examination of the cases which came before the court, seeking a full knowledge of all the intricacies and features of the cases before reaching his conclusions in respect to them. His opinions were the result of careful study and research, and in accord with well-established precedents and authorities.

In the thirty-three volumes of the reports of the Appellate Division are found opinions of his which will remain as testimonials of his ability — clearness of thought — perspicuity of style, his exhaustive exploration of the learning of the books.

He was prompt in the sittings and in the consultation room, ever ready to take to himself his full share of the labors; with great respect and regard for his colleagues, ever anxious to guard the dignity and reputation of the court.

We each and all enjoyed his society, and we loved him for all his noble qualifications.

He has gone to that tribunal from which there is no appeal in the fullness of his strength, "no twilight — no fading." He has done his work. He has earned his rest, and we cherish his memory — we lament his departure and deeply mourn our loss.

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#### IN MEMORIAM.

At a meeting of the Rochester Bar Association held on Tuesday evening, October 11, 1898, a memorial was unanimously adopted and entered on its minutes as follows:

"The ROCHESTER BAR ASSOCIATION is profoundly moved by the sudden blow which has fallen upon the bench, the bar and the State, in the death of MANLY C. GREEN.

"Only four days ago his sturdy presence graced the bench of the Appellate Division of the Supreme Court which he so adorned, and his manly and winning personality was most welcome to those who sought the judgment of that court.

"Always considerate to the bar, never failing in courtesy, an attentive listener to oral argument, conscientious in the examination

of questions submitted to him, and lucid and convincing in his conclusions, the bar had unusual satisfaction in the expectation that he would continue to sit in judgment for many years to come.

"The messenger of death in so unexpectedly arresting his earthly career, has visited upon each member of the Association a personal loss, and brought to each a personal grief, which words do not fittingly describe.

"On motion, William A. Sutherland, Edward Harris, Nathaniel Foote, Joseph S. Hun, Horace McGuire, Charles J. Bissell and Elbridge L. Adams were appointed a committee to represent the Association at the funeral services Thursday, October thirteenth, and to bring its action to the attention of the court."

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REMARKS OF W. H. CUDDEBACK,  
*Corporation Counsel, City of Buffalo.*

I desire to second the motion that has been made to enter the resolutions passed by the Rochester Bar Association upon the minutes of this court, and at the same time I desire to testify to my appreciation of the character and ability of Justice GREEN and to my high regard for his memory.

When I first went to Buffalo to practice at the bar, one of the first attorneys I met was MANLY C. GREEN—he was opposed to me in an action, and I found him then a generous, chivalrous opponent, taking no mean or unfair advantage over those who stood on the opposite side to him, and, winning his case, he won it fairly, upon its merits. When he came to the bench he retained these same characteristics. A kindly, courteous judge, patient, listening to the arguments of the young and inexperienced attorney, which were often rambling and incoherent, and studying out for himself the points they desired to present and elaborating and expounding them, and deciding the case, if they were right, in their favor. Of course, these are the attributes of a just judge, but they were things that we appreciated. We learned to love and admire him, and now he is gone. Cut short in the pride of his career, in the plenitude of his powers. These are things that we cannot understand; the ways of Providence are inscrutable, and we can only bow to the will of the Supreme Being. At the same time we may do, as we have done here to-day, express our appreciation of a man and of a judge, and

that is what I desire to do, to second this motion that has been made, and to ask the court to place these resolutions upon the minutes of the court, as a tribute to and a memorial of a just judge, and a man whose death we all regret.

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REMARKS OF TRACY C. BECKER,  
*Of Buffalo Bar.*

May it please the Court :

I regret very much that, owing to the practice which prevails in the Bar Association of Erie county, no suitable memorial from that association can be placed before the court at this time upon the life and character of Judge GREEN. It has been the practice of our Bar Association, for several years past, not to hold a meeting whenever death takes away from our ranks one of our members, but to have a meeting at a stated time during the year, at which a suitable memorial is presented in the case of each member who has departed, and our feelings in such appropriate words as should be expressed, are expressed and recorded. These memorials are bound up in the form of a memorial volume which forms a record, which is transmitted to the families of our deceased brethren.

Not only at the suggestion of some of my brethren of the Erie county bar, but prompted by the feelings of my own heart, I wish to take advantage of this time and place to record, if I may be permitted to do so, my very sincere, heartfelt appreciation and love for MANLY C. GREEN.

I came to the bar of Buffalo shortly after he had been admitted. I knew of him as a graduate of Williams College, where it was said of him by his associates that everything came easy to his mind ; that however difficult the task imposed upon him might be ; however his generous social nature might prompt him in his associations with his fellow-students to neglect the business of the hour, yet, when the time came, almost by intuition, that bright, strong mind grasped the material that was before him and moulded it into a demonstration of the subject before the class.

These characteristics of very strong mental grasp, of a strong, logical mind, became early manifest at the bar ; and at the time I settled in Buffalo, which was a very short time after he had been admitted to the bar, his position was, in a way, practically an assured one, and he was recognized even then, as he became more definitely

recognized later on, as a man of very high order of mental power, but at the same time shedding a radiance and a light around that power, from a serene and lovely social disposition, the memory of which moved even the rugged presiding justice of this court to tears when speaking of him.

MANLY GREEN! What a fitting name! Manly in appearance; manly by nature, as well as Manly by name. Although I had been an opposing candidate against him for the nomination to the Supreme Court bench, I was called upon with others to bear his remains to their final resting place, and as long as I live will ring in my heart the last despairing utterance of his dear wife, who could find no words to express her love and sorrow as his remains were being lowered, except "Manly, Manly!"

He was a manly man; a strong man, a good and lovely man, and one who made life worth living.

Human nature is sometimes cold. Perhaps too much so in the avenues of business; perhaps too much so in the avenues of our profession; too much so upon the bench. Yet I have a theory of life, which I have heard expressed by others, that no man is truly great or successful except a man who has a heart that is manly. MANLY GREEN had such a heart! Judge GREEN had such a heart!

His heart is forever stilled by death. Never again will we feel his cordial presence. His opinions may be relegated to the back shelves of the book cases, as all opinions will be as time goes on. The memorials which will be recorded to-day may also be forgotten; but the Erie County Bar, and all who came in contact with MANLY GREEN, will always think of him as their friend and associate, their loyal friend, their helper; one to whom we might go for advice and kindly consideration in times of need; and the record that he leaves behind him will never perish so long as we all may live.

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The following is a report of the proceedings had in the Appellate Division upon the death of Judge GREEN, taken from the *Buffalo Review* of November 24, 1898:

"At the opening of the November sitting of the Appellate Division of the Supreme Court at Rochester, Presiding Justice HARDIN delivered an eloquent tribute to the memory of the late Justice MANLY C. GREEN, an associate justice of the court, whose death occurred

during the interim immediately preceding the present session. It was with difficulty that utterance was given to the sentiments expressed by the presiding justice, owing to the emotions which seemed almost to overpower him. Each of the other members of the court were deeply affected and their tears testified to the personal loss sustained by them in Judge GREEN's death.

"At the close of the remarks of the presiding justice, Hon. W. A. Sutherland, Edward Harris, Horace McGuire, E. L. Adams, Nathaniel Foote, Joseph F. Hun, C. J. Bissell, representing the Rochester Bar Association, presented resolutions of regret at the loss sustained in the death of Judge GREEN, which were read by Mr. Sutherland.

"After reading the resolutions Mr. Sutherland moved that they be accepted by the court and ordered entered upon the minutes.

"Edward Harris then rose and seconded the motion of Mr. Sutherland.

"Corporation Counsel Cuddeback, of Buffalo, also seconded the motion. He was followed by Mr. Tracy C. Becker and Harry D. Williams, of this city, who paid a happy tribute to the memory of Judge GREEN in a few well-chosen remarks, followed by Patrick F. King, representing the bar of Niagara county.

"The Hon. John Van Voorhis was the last to second the motion, and at the conclusion of his remarks the presiding justice ordered the resolutions presented entered in the records of this court."

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MANLY C. GREEN was born October 5, 1843, at Sardinia, New York, where he received his early education, but later he removed with his father to Buffalo, N. Y., where he graduated from the High School of that city. In 1866 he entered Williams College, where he remained until 1869 or 1870, when he left the college without graduating and entered the office of Bowen & Rogers as a law student. He was admitted to the bar in Rochester, New York, on April 10, 1874, and soon after formed a partnership with Woolsey C. Hopkins of Buffalo. He was elected a Justice of the Supreme Court in 1891, and took office on the 1st day of January, 1892. In 1895 he was appointed by Governor Morton to serve as an Associate Justice of the Fourth Appellate Division from and after January 1, 1896, in which position he was serving at his death, which occurred October 10, 1898.

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appeal therefrom an undertaking was given to the plaintiff by which the sureties, in case of the affirmance of the judgment or the dismissal of the appeal, agreed to pay all costs and disbursements that might be awarded against the appellants and also the amount directed by the judgment to be paid to the plaintiff, but such undertaking contained no agreement to pay the amount of money adjudged to be paid to the trust company. In proceedings subsequently instituted by an order to show cause why the trust company should not be restrained from issuing execution under such judgment, an undertaking was given to secure the payment of such amount directed to be paid to the trust company, upon the giving of which all proceedings of the trust company in enforcement of the judgment were stayed until the hearing and determination of the appeal.

In an action upon the undertaking given to the plaintiff,

*Held*, that that undertaking operated, so far as the plaintiff was concerned, to stay proceedings upon that portion of the judgment which awarded the costs to him; that the sureties thereon could not resist the enforcement thereof upon the ground that it was not effectual to stay proceedings upon the judgment, and that there was, therefore, no consideration for it.

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2. — *Cash sales made by an assignee before filing his bond.*] The fact that the assignee has sold small articles of property for cash before he has filed his bond, the sales having been made with the consent of the creditors attending a meeting at which the party subsequently objecting thereto was present, does not afford a just ground of complaint. *Id.*

3. — *Neglect of an assignee to perform his statutory duties.*] *Semble*, that the neglect of an assignee to record an assignment, or to do any other act required by the statute, simply furnishes a ground for his removal, and does not impair the title to the property assigned or affect the validity of the instrument in any way. *Id.*

4. — *Assignee — compromise agreement made by the debtor with his creditors — appointment of the debtor as receiver of the assigned property to conduct business therein prior to the settlement of the assignee's claim for commissions.*] Where a debtor, after making an assignment for the benefit of his creditors, effects a compromise with all of them, leaving no claim outstanding against the assigned property, except that of the assignee for his commissions, the court, although it may not, prior to a settlement of such claim, direct a retransfer of the assigned property to the assignor, may, where the non-user of such property, consisting of a summer hotel, is likely to result in serious loss, and the assignee makes no attempt to carry on the hotel business therein, properly appoint the assignor a receiver of the property, which is thus retained within the custody and under the control of the court, in order that he may conduct the hotel business therein for the ensuing season, he being, by reason of his previous experience as proprietor of the hotel, a competent person to do so. *DICKINSON v. EARLE.* 559

— *Receiver appointed in supplementary proceedings — his rights as against an assignee of the debtor — his substitution in a pending litigation — rights of the attorney in such suit.*

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**ASSOCIATION** — *Taxation — medical society organized under chapter 94 of the Laws of 1813 — it is not exempt from taxation under chapter 498 of the Laws of 1893.*

See *PEOPLE EX REL. MEDICAL SOCIETY v. NEFF.*..... 83

— *For insurance.*

See *INSURANCE.*

**ATTORNEY AND CLIENT** — *Transfer by a client to her attorney — a court refusing to allow further evidence upon the question of consideration should not submit the question of consideration to the jury.*

See *LYON v. BROWN.*..... 323

— *Receiver appointed in supplementary proceedings — his rights as against an assignee of the debtor — his substitution in a pending litigation — rights of the attorney in such suit.*

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**AUCTION** — *Sales (other than judicial sales) of real property at.*

See *VENDOR AND PURCHASER.*

**AUDIT** — *Of county accounts.*

See *COUNTY.*

**BAILMENT** — *Loss of goods by fire — false representations as to the fireproof character of warehouse buildings.*

See *DIETZ v. YETTER*..... 453

**BANKING** — *Bank directors — their liability for declaring dividends — the question whether renewal notes were improperly credited as assets, how determined.* An action was brought by a receiver of a bank to recover from the directors thereof dividends declared by them, on the ground that at the time the dividends were declared the bank had no surplus profits, and that, although there was an apparent surplus, it was created by certain notes improperly credited as assets, which, while by their terms they were not in default with interest unpaid for over a year, were renewals of previous obligations extending back for a long period of time, during which no interest or principal had been paid, except so far as the interest was included in the amount of the renewal notes or in separate obligations.

*Held*, that it was proper to submit to the jury the question whether the notes, taken in renewal of previous obligations, with the addition of the interest thereon, were taken in the due course of business and whether the amount of accrued interest included in the new notes represented loans of money such as would have been made apart from any prior relation of the debtors to the bank, or whether they were taken merely to cover defaulted debts, described in section 26 of chapter 689 of the Laws of 1892.

*DYKMAN v. KEENEY*..... 45

— *The title of a bank to a check deposited — it is not subject to equities between the drawer and the depositor — when a check becomes due — effect of charging a protested check back to the account of the depositor.*

See *RIVERSIDE BANK v. WOODHAVEN JUNC. L. Co.*..... 259

— *Trust — the effect of depositing money with a trust company in the name of the depositor as trustee for another — when it does not create an irrevocable trust.*

See *DEVLIN v. HINMAN*..... 107

## **BASTARDY:**

See *PARENT AND CHILD.*

**BILLS AND NOTES** — *An order which was not an accepted bill of exchange — defenses between maker and acceptor available to the acceptor against the payee — proof that the acceptor had set up, in another action by the maker, the acceptance of the order, does not establish an estoppel.* 1. An instrument in the following form:

“NEW YORK, July 20, 1895.

“CHARLES F. FONTHAM,  
“105 West 95th St., City:

“DEAR SIR.— Please pay to the American Boiler Company, No. 94 Center street, city, the sum of One hundred eighty-seven and 15/100 (\$187.15) dollars, and charge the same to my account on heating contract at 64 West 99th street, and oblige,

“Yours respectfully,  
“H. J. APGAR.

“Accepted, and I agree to pay the sum specified herein within sixty days from date.

“CHARLES F. FONTHAM,  
“105 West 95th.”

is a mere order on a fund and is not an accepted bill of exchange, and in an action brought thereon by the payee against the acceptor, the latter has the right to show that there was nothing due under the heating contract to the drawer of the order.

The fact that, in an action upon the heating contract, brought by the drawer of the order against Fontham, for moneys alleged to be due thereunder, Fontham set up the acceptance of this order as a payment is not sufficient to establish a right on the part of the American Boiler Company to recover upon such instrument, unless it is made to appear that in that action this sum had actually been charged as a payment on account of a sum which had been found due to the drawer of the order under the heating contract. *AMERICAN BOILER CO. v. FONTHAM*..... 294

**BILLS AND NOTES—Continued.**

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2. — *Note—indorsement in blank—evidence as to ownership—its surrender to the holder by his pledgee.*] The indorsement of a note in blank by the payee and its production by the plaintiff in an action thereon are *prima facie* evidence of the latter's ownership of it, and the existence of subsequent indorsements does not affect this presumption, especially where they are canceled.

The fact that, three days before the note was made, the payee gave to the plaintiff in the action a power of attorney to collect and receive all moneys payable to him, and that the plaintiff received the note for the payee and acknowledged payment of a part of it, does not necessarily rebut the legal presumption of ownership in the plaintiff or establish that he was a mere collecting agent.

The surrender of the note by a pledgee and creditor of the plaintiff implies either that the debt has been paid or that, though not paid, the pledgee intended to relinquish his lien upon the note, and justifies the parties liable upon the note in paying it to the plaintiff. *ZIMMER v. CHEW*..... 504

3. — *Intent of a firm indorsement, how shown.*] A written agreement by a corporation to indorse a series of notes to facilitate their discount by certain firms, is competent evidence that a note of such series, subsequently executed, was indorsed by said corporation with the intention of giving the makers, one of the firms specified in the agreement, credit with the payee.

A firm which, on the seventh of August, agreed to become liable as a joint maker on a note given for the purchase of land in which it was to have an interest, will not be presumed, on the ninth of the same month, to have indorsed such note with the intent that it should involve no liability whatever on its part to the seller of the land; and the fact that it was agreed that a certain company should become a second indorser, and that the firm should indemnify it against all loss by reason of its indorsement, the company thus becoming a surety with a right of recourse against the firm, is cogent evidence that the firm was also liable on its indorsement directly to the payee of the note.

In an action upon such a note, one of the makers may testify as to what was said to him by a member of the firm indorsing the note in regard to the giving of the note; and may also testify as to what the member of the firm said in reference to the responsibility of the indorsers, and may state the nature of the transaction under which the note was given to the plaintiff, and the plaintiff may also properly be asked whether he accepted the note on the faith of the indorsements. *Id.*

4. — *Banking—the title of a bank to a check deposited—it is not subject to equities between the drawer and the depositor.*] Where a customer of a bank deposits in his general deposit account a check drawn to his order and indorsed by him, and immediately thereafter draws a check upon such account and withdraws therefrom the amount of such deposit, the bank becomes vested with a title to the check so deposited, which is not subject to equities existing in favor of the drawer of the check as against the customer, such, for example, as that the check was given without consideration or for a consideration which failed, namely, in exchange for another check transferred by the customer to the drawer upon a representation made by the customer that it was good, the check being, in fact, worthless.

*RIVERSIDE BANK v. WOODHAVEN JUNC. L. CO.*..... 859

5. — *When a check becomes due.*] The check so deposited is taken by the bank before maturity, as a check is not, strictly speaking, due until payment thereof is demanded within a reasonable time. *Id.*

6. — *Effect of charging a protested check back to the account of the depositor.*] The bank's right to recover the amount of the check from the drawer is not affected by the fact that, by a bookkeeper's entry, made subsequent to the protest of the check, the bank charged the amount of the check back to the account of the depositor. *Id.*

— *Payment—delivery by a vendee to his vendor of checks stated to be in full payment—retention of the checks by the vendor, who states that he will accept them upon account.*

*See WISNER v. SCHOPP*..... 199

**BOARD** — *Of county officers.*  
See COUNTY.

**BONA FIDE PURCHASER** — *Of real property.*  
See VENDOR AND PURCHASER.

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**BOND** — *Dismissal for a failure to prosecute — the judgment determines the right to an injunction pendente lite — action on the undertaking — reference to compute damages thereunder.*

See DE BERARD v. PRIAL..... 502

**BOOK** — *Of account.*  
See EVIDENCE.

**BOOKS AND PAPERS** — *Inspection of.*  
See DISCOVERY.

**BROKER** :  
See PRINCIPAL AND AGENT.

**BROOKLYN** — *Greater New York charter, section 1873 — assistant clerk in the court of a justice of the peace in the city of Brooklyn — when his term expires — not affected by any action of the board of estimate and apportionment.*

See McKENNA v. CITY OF NEW YORK..... 152

— *Greater New York — a veteran appointed inspector of street cleaning of the city of Brooklyn subsequently transferred to the same department of Greater New York — power of the street commissioner to remove him.*

See PEOPLE EX REL. SCHUMANN v. MCCARTNEY..... 19

— *A veteran a subordinate officer in Brooklyn — not removable at pleasure by the officer of the city of Greater New York under whose direction he is after the consolidation — his remedy to prevent removal.*

See PEOPLE EX REL. TATE v. DALTON..... 6

— *Expenditures of the county clerk of Kings county in the care of county records are a charge against the city of Brooklyn — audit of the claim.*

See WORTH v. CITY OF BROOKLYN..... 223

**CALENDAR** — *Of causes for trial.*  
See TRIAL.

**CASE** — *On appeal.*  
See APPEAL.

**CAUSE** — *Of an accident.*  
See NEGLIGENCE.

**CERTIFICATE OF NOMINATION** — *Filing of.*  
See ELECTION.

**CERTIORARI** — *Review of an alleged adjudication by certiorari — who is an aggrieved party entitled to the writ.* A person who is deprived, by the discontinuance of a street by the trustees of a village, of the only direct way to reach the shore of a harbor, which is about two blocks distant from his dwelling, and is thereby "compelled to make a considerable detour to the north in order to reach the same, and by reason thereof he is put to great inconvenience and the value of his property is materially lessened," is a party aggrieved by the determination and is entitled to review the same by certiorari.

It is not necessary, in order to make him a party aggrieved, that the action of the village board should be such as to entitle him to maintain an action for damages.

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— *A veteran a subordinate officer in Brooklyn — not removable at pleasure by the officer of the city of Greater New York under whose direction he is after the consolidation — his remedy to prevent removal.*

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**CHATTEL** — *Law of chattels.*  
See PERSONAL PROPERTY.

— *Sale of.*  
See SALE.

**CHECK:**

See **BILLS AND NOTES.**

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See **PARENT AND CHILD.**

**CITY:**

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- § 835 — Neither the fact of the existence of an instrument, nor its delivery by a client, are communications made by the latter to an attorney.  
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<i>See</i> PEOPLE v. WILLIS .....	203
<b>CONSTITUTIONAL LAW</b> — <i>An ex parte final commitment of an inebriate woman to the care of a private corporation is invalid.] 1. A commitment, under chapter 467 of the Laws of 1892, of an inebriate female to St. Saviour's Sanitarium, a private corporation, for the term of one year from the date thereof, or for so much of said term as may be necessary, in the judgment of the trustees of said corporation, for treatment and reformation, issued in a proceeding instituted, carried on and concluded without notice to the person so committed, without a hearing and without her presence,</i>	

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is not due process of law—such commitment being final in its nature and not a mere temporary one intended to restrain the person committed during periods of danger.

PEOPLE EX REL. ORDWAY v. ST. SAVIOUR'S SANITARIUM..... 868

2. — *The commitment cannot be upheld as a temporary one.*] Such a commitment is not valid as a temporary one, under which proceedings might be entertained to investigate the condition of the person committed, as no investigation after commitment is authorized by the statute under which it was issued. *Id.*

3. — *A provision for a subsequent review by habeas corpus is not due process of law.*] The provision of the statute in question, declaring that nothing contained in the act shall be construed to limit the power of the courts to review by habeas corpus the detention of any person committed under the act, is not a provision for due process of law, as that term means process issued before final judgment is rendered. *Id.*

4. — *Temporary summary commitments of alleged incompetent and dangerous persons are proper.*] Temporary summary commitments are, however, just as valid in the case of alleged incompetent and dangerous persons as they are in the case of alleged criminals, who are held in confinement, if not bailed, until they may be put upon trial, and the constitutional provisions, relating to due process of law, do not exclude proper and reasonable police laws and regulations relating to temporary confinement and restraint until trial, or until a hearing can be had. *Id.*

5. — *Effect of the voluntary surrender of the inebriate.*] The fact that the inebriate voluntarily surrendered herself, with knowledge of the commitment and of the period of time for which she was committed, and of the conditions under which the commitment was issued, does not bind her to remain in the institution for any particular period, and cannot be regarded as a waiver of her right to withdraw therefrom at any time when she pleases so to do. *Id.*

6. — *A commissioner appointed by the court of a foreign State has no power to commit a recalcitrant witness to jail in the State of New York.*] A mandate issued under section 920 of the Code of Civil Procedure by a notary public of the State of New York, appointed under the laws of another State a commissioner to take the testimony of a witness residing in the State of New York in an action pending in such other State, which recites that certain pertinent and proper questions were propounded to the witness and that the witness refused and continues to refuse to answer each and every of said questions, but does not in terms adjudge the witness guilty of contempt, and which commands the city marshal to place the witness in the custody of the sheriff and directs the sheriff to receive him into his custody and to confine him in the county jail "until he shall submit to answer the said questions and each thereof, so put to him by counsel for plaintiffs in said action, or is otherwise discharged according to law," does not constitute due process of law and is void. PEOPLE EX REL. MACDONALD v. LEUBISCHER..... 577

7. — *Power of the Legislature.*] The Legislature of the State of New York has no power to confer upon an individual, who has no judicial power vested in him either by the Constitution or the Legislature of that State, and is not connected in any way with any of the courts or bodies thereof in whom the judicial power is vested, the authority to issue a process by which a person may be deprived of his liberty or his property. *Id.*

8. — *Statutory construction.*] The court will not so construe a statute as to bring it into conflict with the Constitution either of the State of New York or of the United States, in their provisions relating to the obligations of contracts. KOELESCH v. CITY OF NEW YORK. .... 98

— *Long Island City—chapter 141, Laws of 1896, relating to the tax on foreign insurance companies, is a "special city law"—it was not legally passed.*  
See EXEMPT FIREMEN ASSN. v. TRUSTEES..... 138

— *County of Nassau—section 5 of chapter 588, Laws of 1898, providing for a board of supervisors of that county, is constitutional.*  
See MATTER OF NOBLE ..... 55



**CONSTRUCTION** — *Of constitutional provisions.**See* CONSTITUTIONAL LAW.— *Of contracts.**See* CONTRACT.— *Of deeds.**See* DEED.— *Of statutes.**See* SESSION LAWS.*See* STATUTE.— *Of wills.**See* WILL.

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**CONTEMPT** — *Of court — refusal of a judgment debtor to deliver to a receiver possession of his property which is commingled with goods consigned to him as agent.]* 1. A judgment debtor, who has been ordered by the court to deliver to a receiver appointed in supplementary proceedings "all property and money now in his possession or under his control belonging to him and not exempt by section 2463 of the Code of Civil Procedure," is not excused from complying with a demand made by such receiver for "possession and control of the business and property" at a store kept by the debtor, by the fact that he has in such store a quantity of goods consigned to him for sale as well as a quantity of goods commingled therewith belonging to himself.

The refusal of the debtor in such a case to make delivery, so far as the store and the goods actually owned by him are concerned, constitutes a contempt of court, which is not excused by his statement that it is impossible for him to separate consigned from unconsigned goods without a day's labor and going over his stock piece by piece.

*Quære*, as to the duty of the judgment debtor to surrender the consigned goods. **MATTER OF CAMERICK** ..... 81

2. — *Judgment enjoining the owner of bathing houses from permitting his patrons to use a private road — removal by him of a fence on his own land, thereby facilitating such use.]* In proceedings for contempt for a violation of a judgment prohibiting a party from permitting the patrons of his bathing houses to make use of a private road or lane mentioned in the judgment, proof that he removed a fence on his own land, so as to allow such persons to gain convenient access to the private road, justifies a decision adjudging him to be guilty of a contempt of court in willfully permitting a use of the private road which was forbidden by the injunctive portion of the judgment.

**DOUGLASS v. BUSH** ..... 226

3. — *Judgment debtor — his refusal to pay over to a receiver money on deposit in a bank account in his wife's name, in which he has deposited money of an insurance company.]* A judgment debtor who has been directed to pay over to a receiver, appointed in proceedings supplementary to execution against him, money deposited in a bank in the name of his wife, from whom he has a power of attorney under which he has managed the account as his own, is not excused from obeying the order in respect to money, which he conceded to have been his own, deposited in this account, by proof that he was a fire insurance broker, and that the premiums upon insurance effected by him were paid by checks to his order which he had deposited in this bank account, it not appearing that the money directed to be paid to the receiver included any money belonging to the insurance company.

**MATTER OF WELD** ..... 471

— *A commissioner appointed by the court of a foreign State has no power to commit a recalcitrant witness to jail in the State of New York — power of the Legislature.*

*See* **PEOPLE EX REL. MACDONALD v. LEUBISCHER** ..... 577

**CONTRACT** — *Building contract — a written adjustment of differences between the parties thereto is conclusive in the absence of fraud.]* 1. Where differences between the parties to a contract for the building of a house result in an adjustment of accounts, in evidence of which the contractors execute a writing stating an amount received by them and the balance due, namely, \$4,046.23, and adding, "leaving the utmost that we can call upon you to pay us four thousand and forty six 23-100 dollars, less the value of" certain mate-

**CONTRACT**—*Continued.*

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rials on the premises, the value of which was to be credited to the owner, and concluding with the statement, "All extras have been adjusted between us, and no more will be charged to you unless you order them in writing," the contractors cannot, in an action subsequently brought by them against the owner, show that bills which were rendered prior to the settlement, and were partly for extra work done by them, were not included in the original contract and were not adjusted by the compromise agreement, there being no proof of fraud or misrepresentation sufficient to invalidate the compromise agreement. *EMSLIE v. LIVINGSTON*..... 138

2. — *What is an unliquidated claim.*] Where no fixed price is stated in a contract for the performance of work, but there is a limit beyond which the party ordering the work cannot, by the terms thereof, be held liable, the claim for work done thereunder falls within the category of an unliquidated demand. *Id.*

3. — *Agreement to make compensation for services by will—evidence establishing a right to such compensation.*] Upon the hearing before the surrogate of a claim made by one sister against the estate of another, evidence was given to the effect that the decedent in her lifetime agreed to compensate the claimant, for her services in caring for and nursing her, with all the property of which she should die possessed, and that all of such property would not be an excessive compensation therefor; that each sister had directed a will to be drawn in favor of the other, but that by mistake each signed the will which had been prepared for the other, and that the mistake was not discovered until after the death of the deceased sister.

*Held*, that while the evidence was susceptible of a construction establishing an intent to give an estate by will, which intent had failed of execution, it was also sufficient upon which to find an agreement to compensate for services quite independent of the intention to give the estate, and that the decree of the surrogate allowing the claimant the entire surplus of the decedent's estate in satisfaction of her claim was proper. *MATTER OF WESCOTT*..... 239

4. — *Advertising—to be paid for by certain deductions from the price of articles to be purchased—such provision is not applicable where the purchase is agreed to be for cash.*] Under an agreement made by a corporation providing that, "in consideration of the insertion of an advertisement \* \* \* we promise to allow and deduct from our contract price for naphtha launches, providing said price amounts to \$5,000 or more, the sum of eleven hundred and fifty-five dollars (\$1,155) on or after publication and delivery to us of twenty-five books containing our advertisement," the party by whom such advertisement is to be inserted is not entitled to offset the sum of \$1,155 against the purchase price of two launches for which he has subsequently agreed to pay the sum of \$5,000 to a corporation which had assumed the obligations of the corporation first above mentioned, where such purchase has been made without knowledge on the part of the corporation of the intention of the purchaser to take advantage of the advertising contract, and with a distinct statement by the president of the corporation that the sale was to be for cash, in consideration of which the corporation agreed to fix the price at the sum of \$5,000. *HAND v. GAS ENGINE & POWER CO.* . . . . . 354

5. — *Contract of sale—violation of an agreement that the vendee was to sell the merchandise to a third party—a guarantor is not thereby discharged.*] A surety, who has guaranteed the payment for oats sold under an agreement by the vendee that they were for the use of, and to be sold only to, the Brooklyn fire department, and that all moneys received from such department were to be applied in payment thereof, is not relieved from his obligation because the vendee diverted a part of the oats to other purposes and did not deliver them to the fire department as provided for in the contract of sale. *FULTON GRAIN & MILLING CO. v. ANGLIM*..... 164

6. — *Application of payments—proof required of the surety.*] Where it appears that the vendee made other purchases from and had another account with the vendor, and that he, during the same period, also furnished other goods to the fire department, the burden rests on the surety to show that drafts of that department, which the vendee either directly or indirectly

**CONTRACT** — *Continued.*

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received, were given by it on account of goods sold under the particular contract, for the performance of which he was surety. *Id.*

7. — *Contract for work — insufficiency of proof of the service of notice to the contractor to begin work as the basis of a set-off for delay.*] In an action brought to recover the amount due upon a contract for repairing a sea wall, the defendant set up a claim for liquidated damages for delay in completing the work under a provision of the contract requiring the plaintiff to commence the work "on such day and at such place or places as the commissioner of the department of public parks may designate," and in support of such claim the engineer in the department of parks, who had charge of the work, testified that he sent the contractor (the plaintiff) written notice to commence work on a certain day, a copy of which notice was produced, and further testified: "I don't know what I did with this letter; my usual course is to mail them; I have no recollection whether I mailed it or sent it by special messenger."

*Held*, that such testimony, unaccompanied by other proof, was insufficient to justify a finding by the jury that such notice as the contract required was ever given to the plaintiff. *Dwyer v. The Mayor*. . . . . 450

8. — *Contract to pay for "placing" a loan — the expense of searching the title is not covered by the word "placing."*] In a contract, by which an owner of property agrees to pay a certain sum to a broker for "placing" a loan thereon, the word "placing" refers merely to the obtaining of the loan, and, if not otherwise qualified, imports nothing, one way or the other, as to the payment of the expense of searching the title to the property upon which the loan is to be made. *Heiberger v. Johnson*. . . . . 86

9. — *Expert testimony as to the meaning of "place."*] The use of the word "place" in reference to loans is too familiar to warrant or require the admission of expert testimony to explain its meaning. *Id.*

— *An order which was not an accepted bill of exchange — defenses between maker and acceptor available to the acceptor against the payee — proof that the acceptor had set up, in another action by the maker, the acceptance of the order, does not establish an estoppel.*

*See American Boiler Co. v. Fontham*. . . . . 294

— *Agreement by a party to make a child his heir and give him a son's interest in his estate — a statement in a complaint that the plaintiff was an heir at law is a mere conclusion, not an independent cause of action.*

*See Gates v. Gates*. . . . . 608

— *Contract of sale providing for a test to be made by a person named — agreement that the test should be made by another — proof of such agreement by the vendor under a complaint alleging performance.*

*See Hubbard v. Chapman*. . . . . 252

— *Municipal corporation — payment of warrants of the general improvement commission of Long Island City refused, because of lack of funds — liability of the city of New York to an action for the amount thereof.*

*See Koelesch v. City of New York*. . . . . 98

— *Vendor and purchaser — title originating in a tax lease, after the expiration of which the tenant has continued in possession — a title by adverse possession must rest on unassailable proof thereof.*

*See Ruess v. Ewen*. . . . . 484

— *Transfer by a client to her attorney — a court refusing to allow further evidence upon the question of consideration should not submit the question of consideration to the jury.*

*See Lyon v. Brown*. . . . . 323

— *Brokerage on a marriage contract — payment of the broker's fee by the wife with property procured from the husband — the latter may sue for its recovery.*

*See Place v. Conklin*. . . . . 191

— *Contract to fill in a street and maintain it at grade for a year — duty of the contractor as to continuing the work — direction of the street commissioner to stop.*

*See Johnson v. City of Mount Vernon*. . . . . 37

**CONTRACT**—*Continued.*

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- *Contract to sell land—liability of one of several contract vendors who persuades some of her co-vendors not to execute a deed.*  
*See* DALY v. CORNWELL ..... 27
- *Mechanic's lien—a payment by the principal contractor to a sub-contractor before it became due.*  
*See* LAWRENCE v. DAWSON ..... 211
- *Law relating to bonds.*  
*See* BOND.
- *Law of, relating to deeds.*  
*See* DEED.
- *Of insurance.*  
*See* INSURANCE.
- *Relating to landlord and tenant.*  
*See* LANDLORD AND TENANT.
- *Law of, relating to mortgages.*  
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- *Of copartnership.*  
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- *Of suretyship.*  
*See* PRINCIPAL AND SURETY.
- *Of sale of personal property.*  
*See* SALE.
- *Specific performance of.*  
*See* SPECIFIC PERFORMANCE.
- *Of sale of real property.*  
*See* VENDOR AND PURCHASER.

**CONTRIBUTORY NEGLIGENCE:**

*See* NEGLIGENCE.

**CONTROVERSY**—*Compromise of.*

*See* COMPROMISE.

**CONVERSION**—*Of personal property.*

*See* PERSONAL PROPERTY.

**CONVEYANCE**—*Of real property.*

*See* VENDOR AND PURCHASER.

*See* DEED.

**CORPORATION**—*A stockholder's liability because the capital stock has not been paid in—objection that the proof that the stock was not paid for tends to show fraud.*] 1. In an action brought against a stockholder of an insolvent corporation organized under the General Manufacturing Act (Chap. 40 of the Laws of 1848, and the acts amendatory thereof), to enforce a debt of the corporation upon the ground that the whole amount of the capital stock fixed and limited by the certificate of incorporation had never been paid in, proof that certain stock was never in fact paid for either in cash or property is competent, notwithstanding the fact that such proof will show that the stock was fraudulently issued, and that there is no allegation in the complaint from which fraud can be assumed or implied. HERBERT v. DURYEA ..... 478

2. — *Issue of stock for services by a promoter.*] *Semble*, that it is improper for the directors of a corporation to issue stock in payment for services rendered by one as a promoter and organizer of the corporation prior to its incorporation, as the statute requires that stock shall be paid for in cash or in property. *Id.*

3. — *Attempted ratification thereof.*] *Semble*, that a resolution subsequently passed by the board of directors which attempts to ratify the issue of the stock to the promoter, is ineffectual. *Id.*

**CORPORATION** — *Continued.*

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4. — *Authority of the president of a corporation to bind it.*] The authority of the president of a corporation to bind the corporation by acts within the scope of his apparent authority may be implied from the adoption or recognition of his acts by the corporation or its directors or trustees.

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5. — *Liability of a corporation upon a guaranty which, because of the identity of the names, is, on its face, the individual obligation of its president.*] *Semble*, that a corporation is liable upon a guaranty which appears upon its face to be the individual obligation of its president, and has a wafer instead of the corporate seal attached, where it is admitted that the president of the corporation, whose name was identical with that of the corporation, intended to bind the corporation, and it appears that he was authorized to do so. *Id.*

— *Landlord and tenant — the duty of the tenant to demand possession is not affected by a threat of the officers of the lessor corporation to refuse possession, made before the commencement of the term.*

See MILLIE IRON MINING CO. v. THALMANN..... 281

— *New York city — who are the "municipal authorities" thereof whose consent is necessary to the laying of gas mains through its streets.*

See GHEE v. NORTHERN UNION GAS CO..... 551

— *Bank directors — their liability for declaring dividends — the question whether renewal notes were improperly credited as assets, how determined.*

See DYKMAN v. KEENEY..... 45

— *Societies, clubs and similar bodies.*

See ASSOCIATION.

— *To carry on insurance business.*

See INSURANCE.

**COSTS** — *An order not allowing costs, reversed with costs.*] 1. Where no costs are allowed by an order, made at the Special Term, in a street opening proceeding in the city of New York, relative to the compensation of an attorney for a landowner, and, on appeal, the order is reversed, with costs and disbursements to be taxed, the clerk should tax the costs of the appeal only and not tax any costs for the proceeding in the court below.

MATTER OF BOARD OF STREET OPENING..... 500

2. — *Items for making and serving a case and for stenographer's minutes, not proper.*] On such an appeal, which is heard upon copies of papers used in the court below, items for making and serving a case and the disbursements for the stenographer's minutes are not taxable. *Id.*

— *Lloyds insurance policy — action against one of several indemnitors — basis of an additional allowance.*

See LAIRD v. LITTLEFIELD..... 43

**COUNTERCLAIM :**

See SET-OFF.

**COUNTY** — *Of Nassau — section 5 of chapter 588, Laws of 1898, providing for a board of supervisors of that county, is constitutional.*] 1. The county of Nassau, created by chapter 588 of the Laws of 1898, containing the towns of Oyster Bay, North Hempstead and Hempstead, was intended to be constituted as a new county for the purposes of the general election held in November, 1898.

The provisions of section 5 of that act, directing that the board of supervisors of that county shall be composed of members who have been duly elected supervisors of the several towns which make up the new county, in the manner and for the period provided by law, are not unconstitutional. Although the board of supervisors is a county organization, its members are properly classed as town officers.

*It seems*, that the supervisors of such towns would constitute the board of supervisors of the new county, even were there no express enactment to that effect in the statute establishing the county. MATTER OF NOBLE..... 55

2. — *Such board may meet as a board of canvassers prior to January 1, 1899.*] Such board of supervisors of the new county came into existence

**COUNTY** — *Continued.*

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prior to the 1st day of January, 1899, so far as related to the duties of the board in the canvassing of the votes cast at the general election in November, 1898, for which purpose the board had power to meet as a board of canvassers, as prescribed in the Election Law, in a place within the territory of the new county, as public as would have been the office of the county clerk had there been a county clerk of that county in existence, and it had power to select a secretary in the absence of such county clerk. *Id.*

3. — *The remedy to prevent names being put on ballots is by mandamus, not by order.*] An order simply directing a county clerk to omit from the official ballots for certain towns of the new county the names of candidates nominated for county offices of another county is not warranted by section 88 of the Election Law (Chap. 909 of the Laws of 1896), but such order should provide for the issuance of a peremptory writ of mandamus. *Id.*

4. — *City of Brooklyn — expenditures of the county clerk of Kings county in the care of county records are a charge against that city.*] An expenditure made in July, 1897, by the county clerk of Kings county in arranging papers which were scattered and mixed together by reason of thirty-two large cases in his office falling from their places without fault on his part, being a proper county charge under section 280 of chapter 686 of the Laws of 1892 (the County Law), is, under section 2 of chapter 954 of the Laws of 1895, consolidating the governments of the county of Kings and the city of Brooklyn, a proper charge against the latter. *WORTH v. CITY OF BROOKLYN*..... 223

5. — *Audit of the claim.*] Where such defense is not set up in the answer or suggested upon the trial of an action brought against the city to enforce such claim, it cannot be successfully argued, on appeal, that before the plaintiff could enforce his claim he was bound to procure authority for its payment from the common council of the city of Brooklyn. *Id.*

— *The board of supervisors of a county may grant the right to operate a railroad upon a country road within a village.*

See *STATEN ISLAND M. R. R. Co. v. S. I. EL. R. R. Co.*..... 181

**CREDIT INSURANCE POLICY :**

See *INSURANCE.*

**CREDITOR :**

See *DEBTOR AND CREDITOR.*

**CRIME** — *Sufficiency of an indictment alleging an agreement between a public officer and a private person by which the officer is to violate his duty.*] 1. An indictment which alleges an agreement between a public officer and a private person (the parties indicted), in terms providing that the public officer shall willfully neglect and violate any duty enjoined upon him by law, the neglect and violation of which shall appear to both parties to be effective to aid the private person in obtaining money, without specifying what that duty may be, and which specifies five overt acts as having been done to effect the object of the alleged conspiracy, charges a criminal conspiracy under the laws of the State of New York. *PEOPLE v. WILLIS*..... 203

2. — *Specification of the time — allegation that "Theodore B. Willis, as commissioner of city works," entered into a conspiracy.*] Under such an indictment the time is sufficiently specified as "in or about the month of February, 1896, but on what particular day the grand jury is unable to more particularly set forth," and an allegation therein that the defendant Theodore B. Willis, as commissioner of city works, entered into the conspiracy, is to be considered as charging that he did so while he was commissioner of city works. *Id.*

— *A determination of police commissioners is not a conviction under section 832 of the Code of Civil Procedure and section 714 of the Penal Code.*

See *PEOPLE v. SULLIVAN*..... 544

— *Offense of selling liquor.*

See *INTOXICATING LIQUOR.*

**DAMAGES** — Pledge of a life insurance policy — waiver by the pledgee of his right to dispose of it without notice — consideration for the waiver — damages recoverable where the policy is surrendered.

See *TOPLITZ v. BAUER*..... 526

— Contract for the erection and sale of a heating apparatus — what use by the vendee, after discovery of defects therein, constitutes an acceptance thereof — counterclaim of the damages resulting from the defects.

See *ELLISON v. CREED*..... 15

— Dismissal for a failure to prosecute — the judgment determines the right to an injunction pendente lite — action on the undertaking — reference to compute damages thereunder.

See *DE BERARD v. PRIAL*..... 502

— Action for personal injuries — proof required to justify the allowance of damages for the expense of medical attendance past and future.

See *PAGE v. DELAWARE & HUDSON CANAL CO.*..... 618

**DEBTOR AND CREDITOR** — Failure to record an assignment for creditors, executed Saturday afternoon, until after a creditors' meeting held the following Monday at two P. M. — it does not establish fraud — cash sales made by the assignee before filing his bond — neglect of the assignee to perform his statutory duties.

See *IRVING NAT. BANK v. WILSON BROS. CO.*..... 481

— Assignee — compromise agreement made by the debtor with his creditors — appointment of the debtor as receiver of the assigned property to conduct business therein prior to the settlement of the assignee's claim for commissions.

See *DICKINSON v. EARLE*..... 559

— Contract of sale — violation of an agreement that the vendee was to sell the merchandise to a third party — a guarantor is not thereby discharged — application of payments — proof required of the surety.

See *FULTON GRAIN & MILLING CO. v. ANGLIM*..... 164

— Municipal corporation — payment of warrants of the general improvement commission of Long Island City refused, because of lack of funds — liability of the city of New York to an action for the amount thereof.

See *KOELESCH v. CITY OF NEW YORK*..... 98

— Pledge of a life insurance policy — waiver by the pledgee of his right to dispose of it without notice — consideration for the waiver — damages recoverable where the policy is surrendered.

See *TOPLITZ v. BAUER*..... 526

— The fact that a wife assists her husband in his business and speaks of the business as their business, etc., does not make her liable for goods sold for use in the business.

See *BLAUT v. FLETCHER*..... 383

— Payment — delivery by a vendee to his vendor of checks stated to be in full payment — retention of the checks by the vendor, who states that he will accept them upon account.

See *WISNER v. SCHOPP*..... 199

— Judgment debtor — his refusal to pay over to a receiver money on deposit in a bank account in his wife's name, in which he has deposited money of an insurance company.

See *MATTER OF WELD*..... 471

— Supplementary proceedings — order for the examination of a third party — the judgment debtor may require it to be filed, although it criminalizes the party obtaining it.

See *SINNOTT v. FIRST NATIONAL BANK*..... 161

— Contempt of court — refusal of a judgment debtor to deliver to a receiver possession of his property which is commingled with goods consigned to him as agent.

See *MATTER OF CAMERICK*..... 31

**DEBTOR AND CREDITOR** — *Continued.*

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— *Principal and surety* — subrogation of the latter, on paying the debt, to the creditor's rights in collateral — the creditor is bound to account for the collateral.

See STERNBACH v. FRIEDMAN..... 584

— *Receiver of a debtor's property.*

See RECEIVER.

**DECREE:**

See JUDGMENT.

**DEED** — *When an easement in, and not the fee of, a street is conveyed* — it may be acquired by eminent domain.

See RAY v. NEW YORK BAY EXTENSION R. R. Co..... 8

— *Specific performance* — effect of the death of one of the grantors before the actual delivery of the deeds to the vendee.

See FAILE v. CRAWFORD..... 278

— *Of real property.*

See VENDOR AND PURCHASER.

**DEFINITION** — "*Municipal authorities*" — *New York city* — who are the "*municipal authorities*" thereof whose consent is necessary to the laying of gas mains through its streets.

See GHEE v. NORTHERN UNION GAS Co..... 551

— "*Regular clerk*" — *city of New York* — an inspector of water supply to shipping is not.

See PEOPLE EX REL. WARSCHAUER v. DALTON..... 302

— "*Unliquidated claim*" — *what is.*

See EMSLIE v. LIVINGSTON..... 183

**DELAY:**

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**DELIVERY** — *Of deeds.*

See DEED.

— *Of goods sold.*

See SALE.

**DEMAND** — *Before suit.*

See PRACTICE.

**DEPOSIT** — *Of chattels.*

See BAILMENT.

**DETECTIVE** — *Divorce* — *corroboration of the testimony of detectives.*

See HUSBAND AND WIFE.

**DIRECTOR** — *Of a bank.*

See BANKING.

**DISCOVERY** — *Action against brokers to recover margins* — *examination of the defendants before trial to show that the transactions reported by them were fictitious.*] In an action to recover money deposited with brokers as margins for certain dealings in stocks which, the plaintiff alleges, were never bought or sold for her as she had ordered, the brokers having rendered to her accounts of fictitious transactions and misappropriated her moneys, the plaintiff, upon showing that she cannot get the information from the Consolidated Exchange, where the transactions were alleged to have taken place, or from the Exchange Clearing House, is entitled to an examination of the defendants, the brokers, before trial, although they allege that they have preserved no records that will show what their transactions were, and that all the accounts rendered by them were true. LEACH v. HAIGHT..... 522

**DISCREDITING** — *Witnesses.*

See WITNESS.

**DISPOSSESSION** — *Of a tenant.*

See LANDLORD AND TENANT.



**DIVORCE :***See* HUSBAND AND WIFE.**DOCTOR :***See* PHYSICIAN.**DOCUMENTARY EVIDENCE :***See* EVIDENCE.

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**DOMICILE** — *Committee of an incompetent person — residence of the incompetent within section 2323, Code of Civil Procedure — an order made in the wrong district is irregular, not void.*

*See* MATTER OF PORTER..... 147**DUE PROCESS OF LAW :***See* CONSTITUTIONAL LAW.**DURESS AND UNDUE INFLUENCE :***See* FRAUD.

**EASEMENT** — *When an easement in, and not the fee of, a street is conveyed — it may be acquired by eminent domain.]* *Semble*, that a grantee, under a conveyance which bounds the land conveyed upon the exterior line of an avenue, not then existing, but thereafter to be opened, and which contains a covenant that the avenue shall be opened as a street bounding the premises conveyed, and that the grantee, his heirs and assigns, "may enjoy the privilege of using the same as such forever," obtains only an easement in the avenue.

Such easement constitutes a property right, which is subject to proceedings for condemnation *in invitam*.

*RAY v. NEW YORK BAY EXTENSION R. R. Co.*..... 3**EDUCATION :***See* SCHOOL.

**EJECTMENT** — *Waiver by a tenant at will of his right to the statutory notice to quit.]* A tenant at will, entitled to the statutory notice of thirty days to quit, waives that right where, in an action of ejectment against him, his counsel, a question having arisen as to the legitimacy of the plaintiff, states that the defendant disclaims any right to the premises if the plaintiff was the heir of his father. *WISSEL v. OTT*..... 159

**ELECTION** — *Certificate of nomination for State Senator — when it may be filed under section 59 of the Election Law.]* 1. A candidate for State Senator is entitled at any hour of the day, "at least twenty-five days prior to the holding of the election," to file with the clerk of the county a certificate of nomination for that office, and the delivery of such a certificate to the clerk, between the hours of ten and eleven in the night of the last day on which such certificate could be lawfully filed, is sufficient under the provisions of section 59 of the Election Law (Chap. 909 of the Laws of 1896).

The certificate need not be filed within the hours during which the clerk is required, by statute, to keep his office open for the transaction of public business. *MATTER OF NORTON*..... 79

2. — *Distinguished from acts affecting the rights of third parties.]* The distinction between the construction to be given to a law which creates an involuntary lien and fixes the rights of third parties affected thereby, and one which seeks a method of procedure by which the nomination of candidates for office is evidenced, considered. *Id.*

— *Election by a life tenant as to conveying her own land devised by a will — effect of non-compliance with the will.*

*See* SHANLEY v. SHANLEY..... 172

— *The remedy to prevent names being put on ballots is by mandamus, not by order.*

*See* MATTER OF NOBLE... 55

**ELEVATOR** — *Negligence — injury caused by the jolting of an elevator — when no neglect is shown on the part of the persons maintaining the elevator.*

*See* NEGLIGENCE.

**ELEVATOR**— *Continued.*

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— *Negligence—accident on a passenger elevator having a door operated by a button in the floor.*

See NEGLIGENCE.

**EMINENT DOMAIN**— *New York city—condemnation proceedings to acquire land for a public park—they may be discontinued under section 1000 of chapter 378 of 1897, without costs.*

See MATTER OF THE MAYOR. . . . . 468

— *When an easement in, and not the fee of, a street is conveyed—it may be acquired by eminent domain.*

See RAY v. NEW YORK BAY EXTENSION R. R. CO. . . . . 3

— *Equitable relief to an abutting owner who has conveyed and afterwards regains the title.*

See CHANLER v. NEW YORK ELEVATED R. R. CO. . . . . 305

**EQUITY**— *Equitable relief to an abutting owner who has conveyed and afterwards regains the title.] An owner of property, abutting upon a street upon which an elevated railroad has been constructed, who conveys it, loses his right to equitable relief, and the railroad company, defendant in an action brought by such owner for an injunction and damages because of the construction of the railroad, is entitled to a jury trial of the question of past damages, but when the owner regains his title to the property he regains also his right to have all the questions presented by such action settled by a court of equity.*

A cause of action which equity will enforce as an incident to equitable relief need not necessarily be one which has been such an incident throughout.

The proof, as to the actual rents received from such property, which is sufficient to justify a recovery, considered; and here held to be insufficient. CHANLER v. NEW YORK ELEVATED R. R. CO. . . . . 305

**ESCROW**— *Deeds held in escrow.*

See DEED.

**ESTOPPEL**— *An order which was not an accepted bill of exchange—defenses between maker and acceptor available to the acceptor against the payee—proof that the acceptor had set up, in another action by the maker, the acceptance of the order, does not establish an estoppel.*

See AMERICAN BOILER CO. v. FONTHAM. . . . . 294

— *Landlord and tenant—the duty of the tenant to demand possession is not affected by a threat of the officers of the lessor corporation to refuse possession, made before the commencement of the term.*

See MILLIE IRON CO. v. THALMANN. . . . . 281

— *Building contract—a written adjustment of differences between the parties thereto is conclusive in the absence of fraud.*

See EMSLIE v. LIVINGSTON. . . . . 133

**EVICTIION**— *Of a tenant.*

See LANDLORD AND TENANT.

**EVIDENCE**— *When the admission of letters between the parties not relating to the subject of the action requires a new trial.] 1. In an action brought to recover on two promissory notes, given to a son by his mother, who had since died, to which the defense of want of consideration was interposed, a letter written by the son to the mother, and a reply by the latter, both written some two months after the date of the first note and some four years prior to the date of the second one, in which letters the writers criticised each other's conduct relating to the board and care of the mother by the son, but made no reference to the notes, are incompetent, and, being calculated to prejudice the jury, their admission in evidence over the objection of the son constitutes good ground for a new trial where a verdict is rendered against him. HOAG v. WRIGHT . . . . . 260*

2. — *A determination of police commissioners is not a "conviction" under section 832 of the Code of Civil Procedure, and section 714 of the Penal Code.] The determination of police commissioners, in proceedings before them,*

**EVIDENCE—Continued.**

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imposing a fine or other punishment for dereliction of duty on the part of a member of the police force, is not a "conviction" within the meaning of section 832 of the Code of Civil Procedure, and section 714 of the Penal Code, which may, on his trial in a criminal action in which he is convicted of an assault in the third degree, be proved on his cross-examination in order to affect his credibility.

The conviction referred to in these sections is the same as that which would formerly have disqualified a person from testifying, and such as is reached after an orderly trial in a court of law, before a judge or petit jury. *PEOPLE v. SULLIVAN* ..... 544

3. — *Objection to testimony competent as to one of several defendants.* Where an action is brought against two defendants having conflicting interests, an objection to a question tending to elicit a fact material as against one of them is not well taken. If the answer is incompetent and prejudicial to the other defendant, a motion to strike it out should be made and an exception taken to the denial thereof.

*KEEGAN v. THIRD AVENUE R. R. Co.* ..... 297

— *New York city—action for services rendered to the board of fire commissioners—failure to record a resolution of such board reciting such employment—oral evidence establishing the passage of such resolution.*

*See CALAHAN v. THE MAYOR.* ..... 344

— *Police officer—proceedings for his removal—effect of a failure of the record to show that witnesses were sworn—testimony of the officer which establishes the charges made against him.*

*See PEOPLE ex REL. BALLARD v. MOSS.* ..... 475

— *Accident on a passenger elevator having a door operated by a button in the floor—proof of notice of the dangerous construction of the door and of similar accidents.*

*See AULD v. MANHATTAN LIFE INS. CO.* ..... 491

— *New trial on the ground of newly discovered evidence—what evidence justifies it—it may be granted after appeal taken and judgment affirmed—laches.*

*See KEISTER v. RANKIN.* ..... 288

— *Fraudulent transfer—evidence establishing the fraud—books of account kept by the transferrer—when admissible against both the transferrer and transferee.*

*See SAUGERTIES BANK v. MACK.* ..... 494

— *Corporation—a stockholder's liability because the capital stock has not been paid in—objection that the proof that the stock was not paid for tends to show fraud.*

*See HERBERT v. DURYEA.* ..... 478

— *Action for rent—a former judgment for rent due under the same lease is conclusive as to the defenses of eviction and surrender prior to its rendition.*

*See ZEREGA v. WILL.* ..... 488

— *Conversion of chattels by a sheriff—proof as to its effect on the owner's customers and business—the price on an execution sale is some evidence of value.*

*See MONTIGNANI v. CRANDALL COMPANY.* ..... 228

— *The use of the word "place" in reference to loans is too familiar to warrant or require the admission of expert testimony to explain its meaning.*

*See HEIBERGER v. JOHNSON.* ..... 66

— *Divorce—corroboration of the testimony of detectives—foreign decree granted without service of process upon, or any appearance by, the defendant.*

*See WINSTON v. WINSTON.* ..... 400

— *Action for personal injuries—proof required to justify the allowance of damages for the expense of medical attendance past and future.*

*See PAGE v. DELAWARE & HUDSON CANAL CO.* ..... 619

— *Action by a taxpayer against village trustees who have made excessive appropriations—injury peculiar to him need not be shown.*

*See GERLACH v. BRANDRETH.* ..... 197

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- *Contract* — agreement to make compensation for services by will — evidence establishing a right to such compensation.  
See *MATTER OF WESCOTT*..... 239
- *Release executed by a mother to her son* — what evidence will rebut the presumption of undue influence.  
See *FERRIS v. FERRIS*..... 144
- *Malicious prosecution* — the plaintiff must prove want of probable cause in addition to his innocence.  
See *KUTNER v. FARGO*.... 317
- *Negligence* — evidence of ownership of premises set on fire by sparks from a locomotive.  
See *VAN INWEGEN v. PORT JERVIS, M. & N. Y. R. R. Co.*..... 95
- *Examination of witnesses in relation to newspaper articles* — privilege of an attorney.  
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- *Proof of an oral agreement contemporaneous with a deed and to the same effect.*  
See *STOKES v. STOKES*..... 423
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See *SHANLEY v. SHANLEY*..... 172
- *Proof by interested witnesses* — presumption of negligence not overcome by.  
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See *EXECUTION*.

**EXCESSIVE VERDICT:**

See *TRIAL*.

**EXCISE** — *Offense of selling liquor.*

See *INTOXICATING LIQUOR*.

**EXECUTION** — *Supplementary proceedings* — order for the examination of a third party — the judgment debtor may require it to be filed, although it criminate the party obtaining it.] In proceedings supplementary to execution, instituted by a judgment creditor to require a third party indebted to the judgment debtor to submit to an examination, the debtor has an interest by virtue of which he may compel the judgment creditor's attorney to file an order which he has procured for such examination, although, the judgment having been paid, the judgment creditor has obtained an order discontinuing the proceeding against the third person. The fact that the order or the affidavit on which it was granted may tend to criminate the person who obtained it is not a justification for his failure to file the papers.

*SINNOTT v. FIRST NATIONAL BANK*..... 161

— *Refusal of a judgment debtor to pay to a receiver in supplementary proceedings money on deposit in a bank account in his wife's name, in which he has deposited money of an insurance company.*

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See *ZIMMER v. CHEW*..... 504

**EXEMPTION** — *From taxation.*

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**EXPERT** — *As a witness*

See *WITNESS*.

**EXPERT TESTIMONY** — *When not admissible to determine the meaning of the word "placing" in a contract to procure a loan.*

See *CONTRACT*.

**EXTRA ALLOWANCE:**

See *COSTS*.

**FALSE IMPRISONMENT** — *A railroad company is not bound by an unauthorized arrest, made in its station, of one not a passenger — what acts of a railroad "detective," towards a person already arrested, are not within the scope of his employment.] In an action brought to recover damages for an alleged illegal arrest and imprisonment of the plaintiff at a station of the defendant's railroad, there was no evidence that the plaintiff had purchased, or was in possession of, a railroad ticket entitling him to ride on the defendant's road, or that he was entitled to ride thereon, or that he stood in the relation of a passenger to the defendant, and it appeared that the persons who made the arrest and who guarded plaintiff's place of imprisonment and forcibly detained him were not employees of the defendant, and it did not appear that any persons acting for the defendant were directed to arrest or detain the plaintiff, although a person employed by the defendant as a detective, and subject to directions by its law department, entered the place where the plaintiff was confined after his arrest, searched his clothing, committed some indignities upon his person, and applied to him abusive language, without, so far as appears, any direction having been given the detective to arrest the plaintiff or to do the acts which he did after the plaintiff was arrested.*

*Held*, that there is no such settled significance to the term "detective" as of necessity imports authority to arrest criminals or persons charged or suspected of committing criminal acts, and that, in order to establish such authority, it is essential that evidence of such conditions as warrant the inference of its existence shall be given;

That there was not sufficient evidence in this case to warrant a submission to the jury of the question whether the detective did or did not act within the scope of his authority.

*PENNY v. N. Y. CENTRAL & H. R. R. Co.*..... 10

**FALSE REPRESENTATION** — *Bailment — loss of goods by fire — false representations as to the fireproof character of warehouse buildings.] Where, in an action brought to recover the value of certain goods which were destroyed by a fire in one of the defendant's warehouses where they were*

**FALSE REPRESENTATION** — *Continued.*

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stored, it appears that upon such buildings and upon the vans used in carrying goods to and from them were signs representing the warehouses as fire-proof structures, whereas only some of them were, and the one in which the goods were stored was not of that character, a question is presented for the jury whether the representation was such as to lead a person of ordinary care and prudence to conclude that it referred to all of the warehouses and whether such representation was made by the warehouseman with fraudulent intent to deceive the public in that regard, and whether the plaintiff, relying thereon, stored his goods in the warehouse, in which event he would be entitled to recover. *DIETZ v. YETTER* ..... 458

**FIDUCIARY RELATION** — *Transfer of land alleged to have been induced by.*

*See* FRAUD.

**FILING** — *In public offices.*

*See* RECORD.

**FINDING** — *On a trial.*

*See* TRIAL.

**FIRE** — *Insurance against.*

*See* INSURANCE.

**FIRM:**

*See* PARTNERSHIP.

**FORECLOSURE** — *Of mortgages.*

*See* MORTGAGE.

**FOREIGN JUDGMENT:**

*See* JUDGMENT.

**FORMA PAUPERIS** — *Action in.*

*See* PLEADING.

**FRAUD** — *Fiduciary relation — transfer of land alleged to have been induced by — absence of a finding to that effect in the record on appeal.*] 1. Upon the trial of an action to procure a reconveyance of land, testimony was given on behalf of the plaintiff that the plaintiff's brother, towards whom the plaintiff, the grantor of the land, entertained a warm sisterly affection, was the active agent of the grantee, his wife, in bringing about the conveyance thereof to the latter, and that both of them orally assured the grantor that the property would be returned to her.

*Held*, that an appellate court, where the record did not disclose any finding on this subject by the trial court, was not in a position to hold that the grantor had shown herself entitled to relief on the ground that the conveyance was procured through the influence of a confidential relation.

*BULLENKAMP v. BULLENKAMP* ..... 198

2. — *Release executed by a mother to her son — what evidence will rebut the presumption of undue influence*] The presumption adverse to the validity of a release executed by a mother to her son, discharging him from any obligation to her estate — his relation to which was that of an agent, involving an element of trust, and necessitating proof on his part that no undue influence was used — is overcome by evidence establishing the mother's long and happy home life with the son and his family during her ten years of widowhood, and her strong and constantly growing affection for him as compared with her other children. *FERRIS v. FERRIS* ..... 144

*See* FALSE REPRESENTATION.

**FRAUDULENT CONVEYANCE** — *Evidence establishing the fraud.*] 1. Evidence that after a debtor had transferred his business to his mother, the business was carried on by the mother in substantially the same manner that it had been theretofore, the son being put in charge at a salary of twenty-five dollars per week, payable out of the proceeds of the business, under an agreement entered into at or about the time the transfer was made, is very strong evidence of fraud, especially when taken in connection with the fact that the value of the property transferred was largely in excess of the alleged consideration for the transfer, and that the debtor failed to enter upon

**FRAUDULENT CONVEYANCE** — *Continued.*

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his books receipts from the business amounting to several thousand dollars received by him at or immediately preceding the transfer.

**SAUGERTIES BANK v. MACK**..... 494

2. — *Books of account kept by the transferor — when admissible against both the transferor and transferee.*] Where the consideration for the transfer was an alleged loan made by the mother to the son, the books of account kept by the son, showing that whatever moneys had been loaned to him by his mother, had, prior to the transfer, been substantially repaid, are admissible in evidence not only against the son but also against the mother.

*Id.*

**FRIGHT** — *While injuries resulting from fright alone do not authorize a recovery, yet where physical injury accompanies the fright it furnishes a basis for a recovery.*

*See NEGLIGENCE.*

**GAS COMPANY :**

*See CORPORATION.*

**GASOLINE** — *Fire insurance — provision that gasoline shall not be used on the premises — responsibility of the insured for a gasoline lamp attached to the exterior wall of the building by a tenant of the stoop thereof.*

*See INSURANCE.*

**GRADING** — *Of streets.*

*See MUNICIPAL CORPORATION.*

**GRANTOR AND GRANTEE** — *Of real property.*

*See VENDOR AND PURCHASER.*

**GUARANTY** — *Liability of a corporation upon a guaranty which, because of the identity of the names, is, on its face, the individual obligation of its president.*

*See HALL v. OCHS* ..... 108

— *Contract of.*

*See CONTRACT.*

**HABEAS CORPUS** — *An ex parte final commitment of an inebriate woman to the care of a private corporation is invalid — a provision for a subsequent review by habeas corpus is not due process of law.*

*See PEOPLE EX REL. ORDWAY v. ST. SAVIOUR'S SANITARIUM* ..... 363

**HUSBAND AND WIFE** — *Divorce — corroboration of the testimony of detectives.*] 1. The testimony of detectives to the effect that they had discovered a husband in a house with a woman who had previously accompanied him there, under such circumstances as clearly to prove illicit relations between them, is sufficiently corroborated within the rule requiring the corroboration of such testimony as a condition precedent to the entry of a decree dissolving the marriage contract, by the statement of a witness who had charge of the apartments in one of which the detectives swore that they found the husband and his companion that, on the occasion in question, the detectives were there and were admitted to such apartments in the manner testified to by one of them, and that the witness afterwards heard "some disturbance," she identifying one of the detectives, although she was not able to identify the others. **WINSTON v. WINSTON**..... 460

2. — *Foreign decree granted without service of process upon, or any appearance by, the defendant.*] A decree of divorce granted in a Territory of the United States without service of process within the Territory on the defendant, who was at all times during the pendency of the action a resident of the State of New York, or his appearing in the action, is not binding upon him.

*Id.*

3. — *Brokerage on a marriage contract — payment of the broker's fee by the wife with property procured from the husband — the latter may sue for its recovery.*] Where a woman, in pursuance of a previous agreement made with a marriage broker employed by her, after her marriage procures money and land from her husband, who is ignorant of the agreement, and pays the broker his stipulated fee by turning over the money and giving a mortgage on the

**HUSBAND AND WIFE** — *Continued.*

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land to him, a suit is maintainable by the husband to recover such money from the broker and to annul the mortgage.

Although the property may have been turned over to the woman after she was married, in pursuance of a promise made at the time of the engagement, the whole transaction is vitiated by the conspiracy between the would-be wife and the marriage broker to obtain the marriage brokerage fee from the husband. *PLACE v. CONKLIN*. . . . . 191

4. — *The fact that a wife assists her husband in his business and speaks of the business as their business, etc., does not make her liable for goods sold for use in the business.*] The fact that a wife, residing with her husband, assists him in his business, makes payment on account of his indebtedness and speaks of the business to those persons dealing with him as their business, or speaks of herself as interested in it, is not, of itself, sufficient to show that goods sold for use in the business were sold to the husband and wife jointly, where no part of the goods were delivered specifically to the wife or used by her and she made no promise to pay for them, and it does not appear that any orders were specifically given by her, or that she intended, in any way, to make herself responsible for them, especially where it appears that the bills for the goods sold were rendered by the vendor to the husband separately, tending to show that he did not give credit to the wife.

*BLAUT v. FLETCHER*. . . . . 388

— *Bill of particulars not granted in an action for alienating a husband's affections by depreciating his wife.*

*See KIRBY v. KIRBY*. . . . . 25

**IDIOT:**

*See INSANE.*

**ILLEGITIMACY:**

*See PARENT AND CHILD.*

**IMBECILE:**

*See INSANE.*

**IMPEACHMENT** — *Of witnesses.*

*See WITNESS.*

**IMPLIED CONTRACT:**

*See CONTRACT.*

**INCORPORATION:**

*See CORPORATION.*

**INDICTMENT** — *Conspiracy* — *sufficiency of an indictment alleging an agreement between a public officer and a private person by which the officer is to violate his duty* — *specification of the time* — *allegation that "Theodore B. Willis, as commissioner of city works," entered into a conspiracy.*

*See PEOPLE v. WILLIS*. . . . . 208

**INDORSEMENT** — *Of negotiable paper.*

*See BILLS AND NOTES.*

**INEBRIATE** — *Constitutional law* — *an ex parte final commitment of an inebriate woman to the care of a private corporation is invalid* — *the commitment cannot be upheld as a temporary one* — *a provision for a subsequent review by habeas corpus is not due process of law* — *temporary summary commitments of alleged incompetent and dangerous persons are proper* — *effect of the voluntary surrender of the inebriate.*

*See INSANE.*

**INJUNCTION** — *Dismissal for a failure to prosecute* — *the judgment determines the right to an injunction pendente lite.*] 1. A judgment entered upon a dismissal of an action for a failure to prosecute it, in which action an injunction pendente lite has been granted to the plaintiff, determines that the plaintiff was not originally entitled to the injunction.

*DE BERARD v. PRIAL*. . . . . 503



**INJUNCTION** — *Continued.*

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2. — *Action on the undertaking—reference to compute damages thereunder.*] It seems, that on an application by the defendants for a reference to compute the damages sustained by them under the undertaking on which the injunction was granted, the plaintiff's affidavit in opposition to the motion, stating the reasons why he submitted to the dismissal of the action, is not competent to limit the effect of the judgment. *Id.*

3. — *Injunction depending on the nature of the action—it cannot be granted on an affidavit.*] A motion for an injunction in a case where the right thereto depends upon the nature of the action must be based upon a complaint, and it cannot properly be granted upon an affidavit stating facts which, if properly set forth in a complaint, might be sufficient to support the order. *WOODBURN v. HYATT.* . . . . . 246

— *Contempt—judgment enjoining the owner of bathing houses from permitting his patrons to use a private road—removal by him of a fence on his own land, thereby facilitating such use.*

*See DOUGLASS v. BUSH.* . . . . . 226

— *Equitable relief to an abutting owner who has conveyed and afterwards regains the title.*

*See CHANLER v. NEW YORK ELEVATED R. R. Co.* . . . . . 305

**INJURY:**

*See NEGLIGENCE.*

**INNKEEPER** — *Sale of intoxicating liquor by.*

*See INTOXICATING LIQUOR.*

**INSANE** — *Committee of an incompetent person—residence of the incompetent within section 2323, Code of Civil Procedure.*] 1. Under section 2323 of the Code of Civil Procedure, requiring an application for the appointment of a committee of an incompetent person, when made to the Supreme Court, to be presented at a Special Term thereof, held within the judicial district where the incompetent resides, or to a justice of the court within such district, the residence of the incompetent is her legal residence, and her temporary domicile in another county does not operate to change it.

*MATTER OF PORTER.* . . . . . 147

2. — *An order made in the wrong district is irregular, not void.*] An order of the Supreme Court, not made in the proper judicial district, is, however, not void, but only irregular; and on an application of relatives of the incompetent, to whom notice of the proceeding has been given, under section 2325 of the Code of Civil Procedure, an order will be made that the proceeding be relegated to the county of her legal residence. *Id.*

— *Constitutional law—ex parte final commitment of an inebriate woman to the care of a private corporation is invalid—when the commitment cannot be upheld as a temporary one—a provision for a subsequent review by habeas corpus is not due process of law—temporary summary commitments of alleged incompetent and dangerous persons are proper—effect of the voluntary surrender of the inebriate.*

*See PEOPLE EX REL. ORDWAY v. ST. SAVIOUR'S SANITARIUM.* . . . . . 363

**INSPECTION** — *Of books and papers.*

*See DISCOVERY.*

**INSURANCE** — *Fire insurance—a policy insuring the owner and also contractors "as interest may appear"—complaint by the contractors which sets forth an insurable interest.*] 1. A complaint which alleges the issuing of a policy of fire insurance, whereby the "defendant insured one Thomas Behan as owner and Sullivan Brothers, the plaintiffs herein, as contractors, as interest may appear," against loss by fire, and that, at the time of issuing said policy, and from that time until the loss therein referred to, the plaintiffs had an interest in the said property insured as contractors; that the value of the building and the amount of the plaintiffs' insurable interest therein at the time of the loss was greater than the loss claimed; that all of said loss fell upon the plaintiffs, they being obliged to, and having restored the building to the condition in which it was immediately prior to said loss without

**INSURANCE—Continued.**

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compensation therefor, sufficiently alleges that the plaintiffs had an insurable interest in the property insured.

Under such a complaint the plaintiffs may properly offer evidence at the trial that they were contractors to erect the building; that it was burned; that they were obliged to and did restore it to its previous condition, and that the loss fell upon them. *SULLIVAN v. SPRING GARDEN INS. CO.* . . . 128

2. — *Setting forth the policy in the complaint.*] In such an action, the policy being a contract for the payment of money only, a complaint which sets forth a copy of the policy and contains an allegation of the amount due, together with other allegations as to extrinsic facts showing the loss, is sufficient under section 534 of the Code of Civil Procedure. *Id.*

3. — *Consideration for the policy.*] Where the complaint alleges, and the policy states, that in consideration of the premium the defendant insured the plaintiffs and the owner as interest might appear, there is a sufficient allegation of a consideration moving from the plaintiffs. *Id.*

4. — *The printed clauses governed by the written ones.*] A condition of the policy making it void if the interest of the insured is other than that of unconditional and sole ownership, or if the building be on ground not owned by the insured in fee simple, is controlled by the written portion of the policy, which shows that it was issued to the plaintiffs as contractors for the erection of the building insured, on property owned by the other party insured by the policy. *Id.*

5. — *The policy creates separate contracts.*] In an action by the contractors to recover upon the policy, an objection that the owner is not made a party is untenable, as the policy insures two parties "as interest may appear," thus creating several contracts, one with each of the insured, upon which each may sue without joining the other. This is especially the fact where the complaint alleges that the owner "makes no claim against the defendant." *Id.*

6. — *Fire insurance — provision that gasoline shall not be used on the premises — responsibility of the insured for a gasoline lamp attached to the exterior wall of the building by a tenant of the stoop thereof.*] Certain articles in a building were covered by a policy of fire insurance which conferred the privilege "to use electric lights in the above-mentioned premises," and provided that "if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above-described premises" gasoline, the policy should be void.

The insured property was destroyed by a fire caused by the explosion of a gasoline lamp which a man, to whom the insured had rented a platform or stoop in the rear of the building, had attached to the outside wall of the building and had used for some time prior to the fire.

In an action brought to recover upon the policy it was,

*Held*, that the insured could not recover;

That the use of the word "premises" in the privilege clause of the policy was equivalent to the word "building" in the prohibitory clause, and that the insured, having control of the premises, which included the building, were under the obligation of seeing that no gasoline was used in the lamp upon the exterior wall of the building within which the insured property was contained;

That ignorance on the part of the insured of the use of the lamp by their tenant was no excuse for their failure to perform this obligation.

*KOHLMAN v. SELVAGE.* . . . 380

7. — *Credit insurance policy — notice of a loss included in the sum to be borne by the indemnified.*] In the adjustment of the amount payable under a policy of credit insurance, by the terms of which the first losses, up to a certain sum, are to be borne by the party indemnified before any claim can be made against the company, and "proof of loss must be made \* \* \* within twenty (20) days after knowledge of the insolvency of any debtor shall have been received by the indemnified, \* \* \* otherwise such claims

**INSURANCE—Continued.**

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shall be barred," the company is entitled to notice of a loss, although such loss be included in the sum which must be borne by the party indemnified, and if such notice be not given, a claim therefore cannot be considered in the settlement of the company's liability.

JAECKEL v. AM. CREDIT INDEMNITY CO. .... 565

8. — *Payments made on an indebtedness after final proof of loss and within the period allowed the company to adjust the loss.*] Under a provision of such a policy that "final proof of loss shall be forwarded to the central office of this company \* \* \* and the amount due by this company under final proof of loss shall be adjusted and paid within sixty (60) days after receipt by the company of such final proof of loss," the company is not entitled to deduct from the amount to be paid by it payments made by the debtors within the sixty days on account of indebtednesses included in such final proof of loss, especially where the policy contains a condition that "no loss can be proven after the expiration of this bond." *Id.*

9. — *Obscure provision not given effect.*] Where the amount of the initial loss to be borne by the indemnified is plainly fixed by one provision of the policy at a certain sum, such amount will not be increased under another condition thereof framed in obscure language and scarcely to be understood from its words. *Id.*

10. — *Accident policy—injuries sustained in falling from a car platform are not sustained "while riding as a passenger in any passenger conveyance."*] Under an accident insurance policy providing that if death results from injuries "sustained while riding as a passenger in any passenger conveyance using steam, cable or electricity as a motive power, the amount to be paid shall be double the sum specified in the clause under which claim is made," a beneficiary is not entitled to recover "double the sum specified," where the insured, while riding as a passenger upon a railroad train, went out from one of the cars upon the open platform at the forward end thereof, from which he fell or was thrown down, and while clinging to the hand-rail or step of the platform was dragged for some distance by the train, until he finally lost his hold and fell from the car upon a bridge which the train was then crossing, and thence to the ground below, where he was found dead, it not appearing by what means or from what cause the deceased fell or was thrown from the platform.

VAN BOKKELEN v. TRAVELERS' INS. CO. .... 399

11. — *Lloyds insurance policy—action against one of several indemnitors—basis of an additional allowance.*] In an action upon a Lloyds insurance policy against one of a number of individual indemnitors, to recover the proportionate amount of the loss for which such defendant is liable, an additional allowance of five per cent is not properly granted upon the entire amount of the loss covered by the policy, although the policy contains a provision that, to avoid multiplicity of suits, no action shall be maintained under the policy against more than one of the indemnitors, and that the final decision in such action shall be decisive upon each indemnitor, in the same manner as if he were sole defendant in a similar suit, "save and except, however, as to the matter of costs and disbursements."

In such a case the subject-matter involved is the sum payable by the defendant thus sued, and does not include the ulterior liability of the other individual indemnitors. LAIRD v. LITTLEFIELD. .... 49

12. — *Lloyds policy of insurance—an action to enforce it may be brought against the general manager at the time of the loss.*] Under a Lloyds policy of insurance, providing that "no action shall be brought to enforce the provisions of this policy, except against the general manager as attorney in fact," etc., an action may be brought against the person who occupies the position of manager at the time a liability arises, although his predecessor's name may appear on the policy as "attorney and manager," especially when it appears that the manager thus sued had been appointed prior to the time the policy was issued and the loss sustained, and that an old printed form of policy having his predecessor's name thereon was used by the company. WHELOCK v. CHAPMAN. .... 464

**INSURANCE** — *Continued.*

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13. — *Marine insurance — unseaworthiness of the vessel at the commencement of the voyage — it does not preclude a recovery on a time policy.*] Although in the case of a time marine policy of insurance the mere fact that the vessel was unseaworthy at the commencement of the voyage does not necessarily preclude a recovery, yet, in an action brought to enforce the policy, the defendant is entitled to have the jury charged "that, if it appears that a vessel shortly after sailing becomes leaky and unfit to perform her voyage and sinks without encountering any peril or storm, this is presumptive evidence of unseaworthiness of the vessel at the beginning of the voyage."

STARBUCK v. PHENIX INSURANCE CO. . . . . 298

— *Pledge of a life insurance policy — waiver by the pledgee of his right to dispose of it without notice — consideration for the waiver — damages recoverable where the policy is surrendered.*

See TOPLITZ v. BAUER. . . . . 526

— *Long Island City — chapter 141, Laws of 1896, relating to the tax on foreign insurance companies is a "special city law" — it was not legally passed.*

See EXEMPT FIREMEN ASSN. v. TRUSTEES. . . . . 188

— *Adopted child — right to inherit a sum payable on the death of a member of the New York Produce Exchange.*

See KEMP v. NEW YORK PRODUCE EXCHANGE. . . . . 175

**INTOXICATING LIQUOR** — *Liquor tax — the exemption in favor of premises, within 200 feet of a schoolhouse, in which liquor was sold on March 23, 1896 — it is waived where the traffic was thereafter suspended for eighteen months.*] 1. The privilege conferred by subdivision 2 of section 24 of the Liquor Tax Law (Laws of 1896, chap. 112, as amended by Laws of 1897, chap. 812), permitting the traffic in liquor on premises within 200 feet of a building used exclusively as a schoolhouse, provided such traffic was actually and lawfully carried on in such premises on March 23, 1896, is forfeited, where it appears that, although such traffic was lawfully carried on in such premises on March 23, 1896, the license expired by operation of law June 30, 1896, and that no liquor tax certificate was granted for the traffic in liquors upon the said premises until December, 1897, the actual traffic in liquors upon the said premises being suspended between June 30, 1896, and January 1, 1898. MATTER OF LYMAN. . . . . 389

2. — *What is not a continuance of the business.*] The mere fact that the fixtures used in the conduct of the business in this place were not removed, and that the person who had owned a chattel mortgage on such fixtures had foreclosed the mortgage and had been in possession of the premises during the period when no business was carried on, does not constitute a continuance of the business such as would prevent the surrender of the privilege to conduct the liquor business upon such premises; nor does the intention of the parties who held the lease, as to the future use of the premises, constitute a continuance of the business. *Id.*

**ISSUES** — *Trial of.*

See TRIAL.

**JUDGMENT** — *A modification thereof is not obtainable by order.*] After a judgment has been entered in an action, deciding that the plaintiff therein is the owner of certain lands within the boundary of an avenue, and that she also possesses an easement therein of access to and from her premises, in front of which a railroad embankment has been constructed, and directing the railroad company, the defendant in the action, to take proceedings to condemn, the court has no power to grant an application to open, amend and correct the judgment so as to show that the plaintiff owned no part of the land within the bounds of the avenue, but only an easement therein.

RAY v. NEW YORK BAY EXTENSION R. R. Co. . . . . 8

— *Contempt — judgment enjoining the owner of bathing houses from permitting his patrons to use a private road — removal by him of a fence on his own land, thereby facilitating such use.*

See DOUGLASS v. BUSH. . . . . 226

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— *Partition* — an interlocutory judgment should provide for an apparent existing lien — the question as to who was the judgment debtor will not be determined on affidavits.

See KELLY v. WERNER..... 68

— *Action for rent* — a former judgment for rent due under the same lease is conclusive as to the defenses of eviction and surrender prior to its rendition.

See ZEREGA v. WILL..... 488

— *Divorce* — foreign decree granted without service of process upon, or any appearance by, the defendant.

See WINSTON v. WINSTON..... 460

**JUDICIAL SALE** — *Objections to the title* — a variation of one-half inch in 141 feet.] 1. On an application by a purchaser at a judicial sale to be relieved from his purchase, a variation of a half inch in a distance of 141 feet does not constitute a substantial defect, where it is not disputed but that the purchaser will obtain a good title to all property included within the boundaries as described in the advertisement of sale.

The fact that buildings on abutting property encroach one-half inch upon the lot purchased, does not justify the purchaser in objecting to the title, where there is no evidence that the encroachment actually impairs, to any extent, the value of the property. MERGES v. RINGLER..... 415

2. — *Encroachment of buildings upon adjoining land, and upon the street.*] The mere fact that some unimportant buildings on the premises sold encroach, to a small extent, upon adjacent premises, does not entitle the party making the purchase to be relieved therefrom, where his right to use the adjacent land for the support of the walls of such buildings is established by adverse possession, and where he has obtained all of the property that he had any reason to suppose that he was to acquire by the purchase.

Where buildings upon the property purchased, which is situated in the city of New York, have encroached for many years, in their present condition, upon a street without objection on the part of the municipal authorities to the continuance of the encroachment, and the extent of the encroachment is such that it is not probable that such an objection will be taken, and it appears that the city, under statutory provision (Chap. 410 of the Laws of 1882, as amended by chap. 610 of the Laws of 1895), would not be allowed to remove the wall, an objection to the title, based upon such encroachment, will not be sustained. *Id.*

**KINGS COUNTY** — *City of Brooklyn* — expenditures of the county clerk of Kings county in the care of county records are a charge against that city — audit of the claim.

See WORTH v. CITY OF BROOKLYN..... 223

**LACHES** — *Contract for work* — insufficiency of proof of the service of notice to the contractor to begin work as the basis of a set-off for delay.

See DWYER v. THE MAYOR..... 450

— *New trial on the ground of newly-discovered evidence* — it may be granted after appeal taken and judgment affirmed.

See KEISTER v. RANKIN..... 288

— *Motion for leave to serve an amended reply to a counterclaim* — when not too late.

See WOOLSEY v. SHAW..... 405

— *Laches in making application for a mandamus.*

See MATTER OF McDONALD..... 512

**LAND:**

See REAL PROPERTY.

**LANDLORD AND TENANT** — *The duty of the tenant to demand possession is not affected by a threat of the officers of the lessor corporation to refuse possession, made before the commencement of the term.*] 1. The president and the secretary and treasurer of a corporation which, by an instrument under seal had leased to certain parties its iron mines, applied, prior to the commencement of the term granted by such lease, to one of the lessees for a

**LANDLORD AND TENANT** — *Continued.*

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loan, and upon the application being denied, the secretary and treasurer said, "If you don't make the loan you can't have the mine," to which the lessee replied, "Very well, we can do without the mine."

*Held*, that the threat was not such a refusal on the part of the corporation to give possession of the mine as would relieve the lessees from the obligation to pay the rent reserved by the lease, especially as there was no proof that they had made any demand of possession after the commencement of the term of the lease, and as it did not appear that the president and secretary and treasurer, at the time of the transaction in question, were acting on behalf of the corporation, or that they had any authority to threaten to refuse to give possession of the demised premises.

MILLIE IRON MINING CO. v. THALMANN..... 281

2. — *Effect of the lessor continuing in possession and taking ore from a mine.*] In such a case, the lessor is not required at the commencement of the term of the lease to abandon the mine and leave it vacant and uncared for, and the fact that while in possession of the mine during the term of the lease the lessor has raised and removed ore therefrom, there being no evidence as to whether such operations resulted in a profit or a loss, is not a defense to an action for the rent accruing under the lease. *Id.*

3. — *Action for rent — a former judgment for rent due under the same lease is conclusive as to the defenses of eviction and surrender prior to its rendition.*] In an action to recover rent, to which the defenses of eviction from and surrender and acceptance of the demised premises are interposed, proof of a judgment recovered in a previous action between the same parties for rent due under the same lease is a conclusive answer to such defenses, as to any matters occurring prior to its rendition. ZEREGA v. WILL..... 488

4. — *When the tenant assumes the risk of the condition of the demised premises.*] Where a tenant has had an opportunity to examine the demised premises prior to the time that the lease was made, and the lease contains no express covenant of warranty, the tenant assumes the risk of their condition. *Id.*

5. — *A surety on a lease not discharged by the lessee's death, nor by a failure to present the claim against his estate, nor by a change of occupation, nor by a violation of a covenant against subletting.*] A surety for the due performance of the covenants of a lease on the part of the lessee is not discharged from the obligation thereby assumed by the death of the lessee, nor by a neglect to present a claim covered by the obligation of such surety against the estate of the deceased lessee, nor by the lessor's assent to a change in the occupation of the premises, especially where it is mutual and has resulted in a reduction of the surety's liability, nor by a violation of a covenant in the lease against subletting, where the surety, a corporation, has consented to such subletting, and was clearly benefited thereby. HALL v. OCHS..... 103

6. — *When premises may be given up by the tenant because of their being flooded as a result of gradual deterioration.*] A tenant of premises, which at the time of the lease were in such a state that by gradual deterioration they fell into a condition such that heavy rain soaked into or ran into and flooded the cellar so as to render the premises untenable, may quit and surrender the possession of the same under the provisions of section 197 of chapter 547 of the Laws of 1896 (The Real Property Law), and escape further payment of rent therefor. MESEROLE v. SINN ..... 33

7. — *Proximate cause.*] In such a case water, one of the elements, will be deemed to have been the proximate cause of the injury. *Id.*

— *Mechanic's lien — covenant in a lease that the tenant will make certain specified changes does not imply a consent that other and additional changes may be made — authority of the lessor's husband to give such consent — notice of lien in which a claim is made only against the tenant.*

See DE KLYN v. SIMPSON..... 436

— *Fire insurance — provision that gasoline shall not be used on the premises — responsibility of the insured for a gasoline lamp attached to the exterior wall of the building by a tenant of the stoop thereof.*

See KOHLMANN v. SELVAGE..... 390

**LANDLORD AND TENANT** — *Continued.*

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— *Vendor and purchaser — title originating in a tax lease, after the expiration of which the tenant has continued in possession — a title by adverse possession must rest on unassailable proof thereof.*

See *RUESS v. EWEN* ..... 484

— *Negligence — defect in the stairs of a tenement house — constructive knowledge thereof on the part of the landlord — obligation of the landlord to light the halls and stairways.*

See *NADEL v. FICHTEN* ..... 188

— *Ejectment — waiver by a tenant at will of his right to the statutory notice to quit.*

See *WISSEL v. OTT* ..... 159

**LEASE:**

See **LANDLORD AND TENANT.**

**LEGISLATURE** — *Powers of.*

See **CONSTITUTIONAL LAW.**

**LIBEL** — *Complaint in an action for libel.*] 1. The complaint in an action for libel should set forth the words complained of as used by the defendant, and it is not sufficient to set out their tenor and effect with innuendoes.

*BATTERSBY v. COLLIER* ..... 347

2. — *Criticism of a picture.*] In an action for libel against the plaintiff in his profession as an artist, the complaint alleged that, in the article complained of, published in the defendant's newspaper, the words occurred: "What matters it if the Colonel's ideas of color, light and shade were a trifle hazy, if his perspectives was a something extraordinary, his 'breadth' and 'treatment' and 'tone' truly marvelous? The surrender was a great, a vast picture, and it was the Colonel's life."

*Held*, that, conceding that these words applied to a picture painted by the plaintiff, the natural construction of them would not make them anything more than a fair criticism of the particular picture — such as is always permitted in regard to any work of art to which the attention of the public has been invited — there being, in this case, no allegation in the complaint that the words were published with any malicious intent. *Id.*

8. — *A libel must relate to professional character generally, not to a particular work.*] Nothing can be said to be libelous of a man in his profession unless it degrades or lowers him in his professional character generally, and it is not a libel of one in that regard to say that, in any particular work, he has fallen below the proper standard or has made a failure. *Id.*

**LICENSE** — *To sell liquor.*

See **INTOXICATING LIQUOR.**

**LIEN** — *Mechanic's lien — covenant in a lease that the tenant will make certain specified changes does not imply a consent that other and additional changes may be made.*] 1. A tenant of premises holding under a lease providing that he shall make certain specified changes therein which shall belong to the party

of the first part (the lessor) "from the time they are so made, so that no part of the same shall be removed during or at the expiration of the said term, and no changes shall be made in said premises after such changes and improvements have been made, without the written consent of the party of the first part first had and obtained," and containing a further covenant that the tenant will not assign the lease unless with the written consent of the lessor, entered into an agreement with a corporation without having himself undertaken the repairs, that he would endeavor to procure the consent of the lessor to an assignment of the lease to it, and that upon obtaining such consent he would so assign it. Under such agreement the corporation took possession of the premises, and executed a contract for the making of other and more extensive alterations than those mentioned in the lease.

In an action brought to foreclose a mechanic's lien for a balance due on the contract,

*Held*, that the lease could not be construed as implying a consent to such other and further alterations, within the meaning of section 1 of chapter 342 of the Laws of 1885, and thus authorizing the filing of the lien, there being

**LIEN** — *Continued.*

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no evidence that the lessor, although she was frequently on the street and saw the work in progress, ever assented to an assignment of the lease or knew of the agreement between her tenant and the corporation, or that the latter was in possession of the premises or doing work thereon.

DE KLYN v. SIMPSON. .... 486

2. — *Authority of the lessor's husband to give such consent.*] *Semble*, that the fact that the lessor's husband had been allowed to collect rents for her or did, as a fact, collect them, or had employed an attorney to act for her, would not justify a finding that he was authorized to consent to additional alterations or changes in the building or to the making of a contract which would charge her interest in the premises with a liability for a large sum of money. *Id.*

3. — *Notice of lien in which a claim is made only against the tenant.*] Where, in a notice of lien, the tenant only is named as the person against whose interest the lien is claimed, the interest of the owner of the property is not affected thereby, as the provision of section 4 of the statute, that the failure to state the name of the true owner, lessee, general assignee or person in possession, shall not impair the validity of the lien, cannot have the effect of binding the interest of a person against whom no claim is made. *Id.*

4. — *Mechanic's lien — a payment by the principal contractor to a sub-contractor before it became due.*] A materialman, being about to file a lien against a sub-contractor, was assured by the principal contractors that the contract between them and the sub-contractor contained a provision for the retention of fifteen per cent of the amount due until the work was completed and "that said moneys had been and would be retained and said provisions and terms of said contract as to payment kept and observed by" them. In reliance upon these representations the materialman refrained from filing his lien for a period of more than six weeks, during which time the contractors, in violation of their representation, paid the fifteen per cent to the sub-contractor in advance of the terms of their contract with him.

The materialman then filed his lien, and in an action to enforce it, it was

*Held*, that under the provisions of section 7 of chapter 418 of the Laws of 1897 (the Lien Law), such payment, having been made prior to the time when it became due, for the purpose of avoiding the provisions of that act, was of no effect as against the lienor, and in the enforcement of the lien was not to be considered in determining the amount due from the contractors to the sub-contractor. LAWRENCE v. DAWSON. .... 211

— *Partition — an interlocutory judgment should provide for an apparent existing lien — the question as to who was the judgment debtor will not be determined on affidavits.*

See KELLY v. WERNER. .... 68

— *Of an attorney for costs.*

See ATTORNEY AND CLIENT.

**LIMITATION OF ACTION** — *Application for leave to issue an execution against executors.*] The fact that the Statute of Limitations has run against any application for an accounting for the purpose of compelling in that proceeding executors to pay a legacy is not a bar to a proceeding for leave to issue execution on a judgment against the executors.

MATTER OF CONGREGATIONAL UNITARIAN SOC. .... 387

**LIQUOR SELLING** — *Regulation of.*

See INTOXICATING LIQUOR.

**LLOYDS INSURANCE POLICY:**

See INSURANCE.

**LONG ISLAND CITY** — *Municipal corporation — payment of warrants of the general improvement commission of Long Island City refused, because of lack of funds — liability of the city of New York to an action for the amount thereof.*

See KOBLESCH v. CITY OF NEW YORK. .... 98



**LONG ISLAND CITY**—*Continued.*

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— Chapter 141, *Laws of 1896*, relating to the tax on foreign insurance companies, is a "special city law"—it was not legally passed.

See EXEMPT FIREMEN ASSN. v. TRUSTEES..... 188

**LUNATIC:**

See INSANE.

**MALICIOUS PROSECUTION**—*The plaintiff must prove want of probable cause in addition to his innocence.*] In an action to recover damages for malicious prosecution the plaintiff must prove, in addition to his innocence, the want of probable cause on the part of the defendant, although there may be cases where, the plaintiff knowing nothing of the facts and circumstances under which the arrest was procured, the bald fact of his arrest, coupled with the circumstances attending it, may suffice, *prima facie*, to show a want of probable cause.

The facts in this case considered and held insufficient to constitute proof of want of probable cause. KUTNER v. FARGO ..... 317

See FALSE IMPRISONMENT.

**MANDAMUS**—*Issued to compel a ministerial officer to pay where the right is clear, although there exists a remedy at law.*] 1. The rule that a mandamus will not be granted where the party has a remedy by action is one addressed to the sound discretion of the court and is not of universal application; and where the right of a party to payment is clear and there are funds on hand applicable to such payment, the court may and will, in the exercise of a sound discretion, compel by mandamus a ministerial municipal officer to audit and pay the claim, although, if the city itself repudiated or denied the existence of the obligation, the rule would be different.

PEOPLE EX REL. BECK v. COLER..... 167

2. — *Prima facie case.*] Where, on an application by a contractor for a mandamus to compel the payment of an amount due him under a contract for the erection of a schoolhouse within the limits of Greater New York, it appears that money for the construction of the schoolhouse was raised by the issue of bonds of the school district, and that the proceeds were paid to the comptroller before the time of the application, the relator has made out a *prima facie* case. *Id.*

3. — *What averments in an answer are insufficient.*] While the rule is strict that all facts averred in answer to an application for a peremptory writ, whether of an affirmative character or merely denials, must be taken as true, the rule is equally strict that affirmations which are only conclusions of law or fact, or are indefinite or general statements, are of no avail and worthless; and a denial in gross, without stating facts, is a mere conclusion. *Id.*

— *A veteran a subordinate officer in Brooklyn— not removable at pleasure by the officer of the city of Greater New York under whose direction he is after the consolidation— his remedy to prevent removal.*

See PEOPLE EX REL. TATE v. DALTON..... 6

— *The remedy to prevent names being put on ballots is by mandamus, not by order.*

See MATTER OF NOBLE..... 55

— *Laches in making application for a mandamus.*

See MATTER OF McDONALD..... 512

**MARINE INSURANCE:**

See INSURANCE.

**MARITIME LAW:**

See SHIPPING.

**MARKETABLE TITLE:**

See VENDOR AND PURCHASER

**MARRIAGE**—*Contract of.*

See HUSBAND AND WIFE.

**MASTER AND SERVANT**—*Negligence—accident on a passenger elevator having a door operated by a button in the floor—proof of notice of the dangerous construction of the door and of similar accidents—negligence of the master co-operating with that of a fellow-servant of an injured employee.*

See *AULD v. MANHATTAN LIFE INS. CO.* ..... 491

—*False imprisonment—a railroad company is not bound by an unauthorized arrest, made in its station, of one not a passenger—what acts of a railroad “detective,” towards a person already arrested, are not within the scope of his employment.*

See *PENNY v. N. Y. CENTRAL & H. R. R. R. CO.* ..... 10

—*Negligence—an employee assumes the risk of walking through a passageway in which baskets are stored—sudden extinguishing of the lights—it must be shown to be due to some fault of the master.*

See *DORNEY v. O’NEILL.* ..... 497

—*Negligence—a master is liable for an injury to his servant occasioned by a defective scaffold—Labor Law, 1897, chapter 415, § 18—violation of a statute or municipal ordinance—contributory negligence.*

See *STEWART v. FERGUSON.* ..... 515

—*New York city—the commissioner of street cleaning may call out employees on Sunday—extra pay for work on Sundays for all such employees.*

See *TYRRELL v. THE MAYOR.* ..... 334

**MECHANIC’S LIEN :**

See *LIEN.*

**MEDICAL ATTENDANCE :**

See *PHYSICIAN.*

**MEDICAL SOCIETY :**

See *ASSOCIATION.*

**MEMORANDUM**—*In writing required by Statute of Frauds.*

See *STATUTE OF FRAUDS.*

**MISREPRESENTATION :**

See *FALSE REPRESENTATION.*

**MORTGAGE**—*Mortgage foreclosure—when a clause relating to a default is not to be construed as governed by chapter 475, Laws of 1890.] 1. Where the record in an action brought to foreclose a mortgage, given to a mutual loan and building company, does not show that a clause in the mortgage, which relates to a default in the making of monthly payments and provides for the service of a notice and demand, either personally or by mail, after which the whole principal sum and interest shall be payable, was drawn with respect to the provisions of the “Act to provide for short forms of deeds and mortgages” (Chap. 475, Laws of 1890), the specific clause contained in the mortgage is not to be construed under the provisions of that chapter, especially where the plaintiff in the complaint itself construes such provision of the mortgage as not coming within that act.*

*MUTUAL BENEFIT LOAN CO. v. JAEGER.* ..... 90

2. —*Conclusion of law considered as a finding of fact.] Circumstances under which a conclusion of law in the report of a referee that the defendant was not in default at the time of the commencement of the action will be deemed on appeal to have been a finding of fact, considered. Id.*

**MORTIS CAUSA GIFT :**

See *GIFT.*

**MOTION**—*For a new trial.*

See *NEW TRIAL.*

**MOTION AND ORDER**—*An affidavit on a motion should be made by the party.] An affidavit used as the basis for a motion should be made by the*

**MOTION AND ORDER**—*Continued.*

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party and not by the attorney unless some sufficient reason be shown why it should be made by the latter. **MATTER OF THE MAYOR**..... 468

— *Judgment*—*a modification thereof is not obtainable by order.*

*See* **RAY v. NEW YORK BAY EXTENSION R. R. CO** ..... 3

**MUNICIPAL CORPORATION**—*New York city—the commissioner of street cleaning may call out employees on Sunday—extra pay for work on Sundays for all such employees.*] 1. The words “and extra pay for work on Sundays” in section 1 of chapter 868 of the Laws of 1894, authorizing the board of estimate and apportionment of the city of New York to fix, within certain limits, the compensation of employees in the department of street cleaning in the city of New York, are not limited in their application to “hostlers” employed in that department, but authorize the board of estimate and apportionment, in its discretion, to provide for extra pay for work on Sundays for every man in the employ of the street cleaning department, including section foremen.

*Seem*, that, under the provisions of said section, that “the members of the department of street cleaning shall be employed at all such times and during such hours and upon such duties as the commissioner of street cleaning shall direct, for the purpose of an effective performance of the work devolving upon said department,” the commissioner of street cleaning is authorized to call out the employees of the department for work on Sundays if, in his judgment, it is necessary.

The fact that the board of estimate and apportionment in taking action under the statute passed a resolution which provided that the salaries “shall be and are hereby fixed at the amounts stated in the statute,” and that, after the presentation to the board of estimate and apportionment of statements of the necessary expense of extra pay for Sunday work, that board, by resolution, fixed the amount to be apportioned to that department at a specified sum, following it with a statement that the above appropriation included all necessary expenses for Sunday work, is conclusive as to the intention to allow compensation for such work pursuant to the provisions of the statute, and raises a fair inference that it was intended to allow it to the persons to whom it might be apportioned in the estimate of the commissioner of street cleaning.

An appropriation having been made for extra pay for Sunday work, it is not important that the amount to be paid to each person who is called upon to perform such work is not fixed, as he is entitled to recover, in an action for such Sunday work, either what his work is actually worth, or at the same rate as his daily week day pay. **TYRRELL v. THE MAYOR**..... 334

2. — *Discharge of a veteran, an inspector of the dock department of the city of New York—when unauthorized.*] An honorably discharged Union soldier who, in October, 1874, entered the employment of the dock department of the city of New York as an expert painter, and in October, 1875, was appointed an inspector of painting and general repairs, and continued to be such up to October, 1894, when he was discharged by a resolution of the dock commissioners, who knew that he was an honorably discharged Union soldier, he being at the time actually employed in supervising a particular piece of work, then uncompleted, and there being other work to be performed by the department of the character of that upon which he had previously been engaged, which, since his discharge, had actually been performed by employees of the department who were not honorably discharged Union soldiers, is entitled to be reinstated under the provisions of chapter 716 of the Laws of 1894.

The effect of the act of 1894 was not merely to bring veterans, when engaged in State work done in cities, within the purview of the general statute; it covers all public works of the cities of the State, whether municipal or governmental, and was intended to extend the protection afforded to veteran appointees by chapter 577 of the Laws of 1892, relating to cities, to all employees, whether in receipt of a definite salary, or compensated for their labor by daily wages.

Chapter 716 of the Laws of 1894 and chapter 577 of the Laws of 1892 are *in pari materia* and should be construed together.

**MUNICIPAL CORPORATION** — *Continued.*

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The act of 1892 limited the power of removal of salaried appointees to cause shown after a hearing had, while the act of 1894 limited such "cause" to incompetency and conduct inconsistent with the position.

PEOPLE EX REL. CUNLIFFE v. CRAM..... 318

3. — *New York city—claim against it, under chapter 543, Laws of 1894, for the unpaid salary of a District Court judge—what is not a sufficient compliance with the act.*] In the enforcement of a claim under chapter 543 of the Laws of 1894, authorizing the board of estimate and apportionment of the city of New York to ascertain and determine the amount of the unpaid salary belonging to one Stemmler, as a justice of the District Court in the city of New York, from January 1, 1870, to October 15, 1873, the claimant must allege and prove that every provision of the act has been strictly complied with.

The mere insertion in the tax levy of 1895 by the board of estimate and apportionment of a provision auditing and allowing the claim at a certain sum, does not, in the absence of any certificate of such board that the salary had not been paid, or as to the amount of the salary for the period mentioned, and in the absence of evidence that such certificate, with the proofs, were filed in the office of the comptroller, constitute a compliance with the requirements of that act.

*Semble*, that, under such action of the board of estimate and apportionment, the claimant would not be entitled, in any event, to recover more than the sum specified by that board, and would not be entitled to interest thereon.

STEMMLER v. THE MAYOR. .... 408

4. — *Street railroad—effect of a condition in the consent of a municipality that connecting street railroads shall have a right to use its tracks.*] A railroad company, accepting a franchise to construct and operate its railroad in a city street, upon the express condition that any other street surface railroad company, operating tracks at least two miles in extent outside the district to which the franchise of such railroad company was limited and connecting with its tracks situated within such district, should have the right to use its tracks and enjoy equal facilities thereto in all respects, cannot deny to another railroad company—operating twenty-eight miles of track outside the district, which has begun proceedings under section 102 of the Railroad Law (Laws of 1890, chap. 565, as amended by chap. 693 of the Laws of 1894) to have commissioners appointed to determine what it should pay to the first mentioned company for the use of the tracks in question, and has secured the payment of whatever compensation should be awarded by giving a bond, approved by the county judge—the right to use its tracks on the ground that the last-mentioned corporation has not obtained the requisite consent from the municipal authorities, or that the conditions attached to the consents procured by the first-mentioned company are not available to the other because void.

STATEN ISLAND M. R. R. Co. v. S. I. EL. R. R. Co.... 181

5. — *Power of a board of supervisors.*] It seems, that the board of supervisors of a county may grant the right to operate a railroad upon a country road within a village. *Id.*

6. — *Acceptance of a consent subject to a condition.*] In view of the provisions of section 102 of the Railroad Law, to the effect that any street surface railroad company may, under certain circumstances, acquire the right to use the tracks of another street surface railroad company for a distance not exceeding 1,000 feet, which imply that a company, having constructed its own line, can, by granting its consent thereto, authorize the operation of another railroad over the same tracks, a company may, by accepting the consent of a municipality thus conditioned, authorize such use of its tracks in advance. *Id.*

7. — *Contract to fill in a street and maintain it at grade for a year—duty of the contractor as to continuing the work.*] A contractor agreed to bring a street to a specified grade and to maintain it at such grade for a period of twelve months after the completion of the work, receiving pay therefor at the rate of thirty cents per "cubic yard of filling for embankment," the proposals for bids for the work stating that the engineer's estimate of the work to be done was a specified number of cubic yards for filling, which is to be "approximate only. \* \* \* The contractor shall

**MUNICIPAL CORPORATION** — *Continued.*

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have no claim against the city by reason of any variation between the quantities of the approximate estimate and the actual quantities as measured when the work is completed."

*Held*, that the contractor could not maintain an action against the city for the work done in bringing the street to grade, where, by reason of the swampy nature of the land, it had settled and been filled up on three or more different occasions, and had again sunk below the grade level within the year. **JOHNSON v. CITY OF MOUNT VERNON** ..... 37

8. — *Direction of the street commissioner to stop.*] In such a case it is the duty of the contractor to continue the work until it has been accepted by the commissioner of public works of the municipality, or until such commissioner has improperly refused to give his certificate; and even where the contractor is justified in suspending the work by the direction of the commissioner, his right to take advantage of such direction is waived by his afterwards continuing the work. *Id.*

9. — *Village—street closing proceeding.*] The trustees of a village can only act in proceedings to close a portion of a village street, instituted under sections 145, 146 and 147 of the Village Law (Chap. 414 of the Laws of 1897), at a session of the board. **PEOPLE EX REL. MERSHON v. SHAW** ..... 61

10. — *An adjudication signed by the trustees when the board of trustees was not in session, and afterwards placed upon its minutes, is invalid.*] Where the records of the board of trustees of the village do not show that the board, as such, has ever arrived at any determination with reference to the discontinuance of a street, but simply that there was placed on the minutes a paper purporting to be such a determination, which had been previously signed by the members of the board at a time when the board was not in session, and when no meeting thereof was held, the adjudication contemplated by the statute is not shown, and the proceeding has no validity or force. *Id.*

11. — *Review of an alleged adjudication by certiorari.*] The action of the board, in assuming to make a determination to discontinue a street under such provisions of the Village Law, is judicial in its character and is, therefore, reviewable by certiorari. *Id.*

12. — *Who is an aggrieved party entitled to a writ of certiorari.*] A person who is deprived, by the discontinuance of the street, of the only direct way to reach the shore of a harbor, which is about two blocks distant from his dwelling, and is thereby "compelled to make a considerable detour to the north in order to reach the same, and by reason thereof he is put to great inconvenience and the value of his property is materially lessened," is a party aggrieved by the determination and is entitled to review the same by certiorari.

It is not necessary, in order to make him a party aggrieved, that the action of the village board should be such as to entitle him to maintain an action for damages. *Id.*

13. — *New York city—action for services rendered to the board of fire commissioners—failure to record a resolution of such board reciting such employment—oral evidence establishing the passage of such resolution.*] In an action for services rendered by the plaintiff as an electrical expert for the city of New York under the alleged direction of the board of fire commissioners, a defense that he was not employed by any competent authority to do the work is not established where it appears that, although, during the time that the plaintiff was at work, there was not upon the record of the board of fire commissioners any entry of a resolution pursuant to which he was employed, a resolution was subsequently passed by that board reciting the passage of a resolution employing the plaintiff at ten dollars a day (which resolution, on account of the absence of the secretary, was not entered upon the minutes), and amending the minutes accordingly, and where it further appears, by the testimony of the president of the board, that such resolution had been adopted.

In such a case the president of the board may testify to the passage of the resolution and his testimony is not objectionable on the ground that it varies the record. **CALAHAN v. THE MAYOR** ..... 344

**MUNICIPAL CORPORATION** — *Continued.*

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14. — *City of New York* — failure to file with the corporation counsel notice of an intention to bring an action against the city — [what does not excuse or waive such failure.] The failure of the plaintiff, in an action against the city of New York to recover for personal injuries caused by the defendant's alleged negligence, to allege in his complaint the filing with the corporation counsel of a notice of intention to bring the action, as required by chapter 572 of the Laws of 1886, is not excused by proof that, after the expiration of the statutory period and when the plaintiff's right to bring an action was foreclosed, a stipulation was entered into between his attorneys and the corporation counsel, whereby it was agreed that the service of his summons and complaint might be made before his examination on behalf of the city comptroller, and that the city would not object to the bringing of the suit prior to such examination. Such conduct was not a waiver by the city of its right to notice.

*Quære*, as to the right of the corporation counsel to waive the filing in his office of the statutory notice. **KENNEDY v. THE MAYOR**..... 311

15. — *Veteran discharged by his office being abolished in bad faith* — laches in making application for a mandamus.] An application for an alternative writ of mandamus against the park commissioner and the department of parks in the city of New York by a discharged Union soldier, whose office of superintendent was abolished for the sole purpose of thus indirectly removing him therefrom, will not be denied because of laches, where it appears that, although the relator was notified on the 14th day of February, 1898, that the position was abolished, his application for the writ was not initiated until the 22d day of August, 1898, such delay being explained by the fact that he had no reason, until the 1st day of May, 1898, to doubt that the position had been in good faith abolished, after which date inquiry had to be made as to whether the position, once actually abolished, had merely been revived, or whether, in fact, it had never ceased to exist, it being necessary in the former case for the relator to establish his right to an original preference, and in the latter to a restoration to his position.

**MATTER OF McDONALD**..... 512

16. — *New York city* — condemnation proceedings to acquire land for a public park — they may be discontinued under section 1000 of chapter 378 of 1897, without costs.] Condemnation proceedings instituted under chapter 320 of the Laws of 1887, as amended by chapter 69 of the Laws of 1895, by a resolution of the board of street opening and improvement to establish a public park in the city of New York may, while pending before the commissioners and before they have finished taking testimony as to value, be discontinued by a resolution of the board of public improvement under section 1000 of chapter 378 of the Laws of 1897, although the proceedings were instituted before the passage of the latter act, as such section relates merely to the method of procedure, which the Legislature has power to change even though the change affects pending actions or proceedings.

On such discontinuance the court has not power to dismiss the proceeding "with costs as in an action." **MATTER OF THE MAYOR**..... 468

17. — *Greater New York charter* — right of the mayor to remove an aqueduct commissioner — it is not affected by section 518 of the charter.] Under section 95 of the charter of Greater New York (Chap. 378 of the Laws of 1897), which by section 1608 thereof is made a continuation of section 1 of chapter 11 of the Laws of 1895, an aqueduct commissioner, appointed under the provisions of section 1 of chapter 490 of the Laws of 1883, as amended by section 1 of chapter 584 of the Laws of 1888, may be removed by the mayor at pleasure within six months after the commencement of the mayor's term of office, and the right of the mayor to exercise this power is not affected by section 518 of the charter, providing that "the term of office of the commission appointed and existing under the aforesaid act shall cease and determine on the first day of January, nineteen hundred and one," as such latter act relates to "the term of office of the commission" and not to the term of office of the individual commissioners.

**PEOPLE EX REL. GREEN v. VAN WYCK**..... 573

18. — *Greater New York charter*, section 1373 — assistant clerk in the court of a justice of the peace in the city of Brooklyn — when his term expires.] An

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assistant clerk in the court of the justice of the peace of the first district of the city of Brooklyn, appointed under section 14 of title 21 of the charter of the city of Brooklyn (Chap. 583, Laws of 1888), assuming that he is continued in office by section 1373 of the Greater New York charter (Chap. 378, Laws of 1897), is subject to the limitation contained in that section, that there shall be in each district in the borough of Brooklyn an assistant clerk, under which provision the justice may designate but one assistant clerk; and the offices of the other assistant clerks, of whom there were four appointed under the act of 1888, were abolished on the 31st of January, 1898.

McKENNA v. CITY OF NEW YORK ..... 152

19. — *Not affected by any action of the board of estimate and apportionment.*] *Semble*, that no action of the board of estimate and apportionment of the city of New York could affect the right of such assistant clerk, if entitled to the office, to his compensation. *Id.*

20. — *City of New York* — an inspector of water supply to shipping is not a "regular clerk."] An inspector of water supply to shipping in the department of public works of the city of New York appointed in September, 1895, is not a "regular clerk," and may be removed without a trial, hearing or an opportunity for an explanation.

PEOPLE EX REL. WARSCHAUER v. DALTON. .... 302

21. — *Application, by an inspector of water supply to shipping, for reinstatement* — conclusion in his application that he is only subject to removal for cause.] Where, in an application by such inspector to be reinstated, his duties are not disclosed, a conclusion, following the statement of the relator's office, that "said office or position was and is that of a regular clerk, and was and is in the classified civil service, \* \* \* and the which said office or position petitioner was and is entitled to continue to hold, subject only to removal for cause, or to abolish unnecessary positions," cannot be sustained. *Id.*

22. — *Police officer* — proceedings for his removal — effect of a failure of the record to show that witnesses were sworn.] *Semble*, that the mere fact that the record of the conviction of a police officer and the stenographer's minutes do not show that certain witnesses examined in the proceedings before the police commissioners for his removal were sworn (there being nothing in the record to show that they were not) is not sufficient to require, on a review of such proceedings under a writ of certiorari, that they be set aside, the legal presumption always being that a public official having jurisdiction to act has acted legally until the contrary appears.

PEOPLE EX REL. BALLARD v. MOSS. .... 475

23. — *Testimony of a police officer which establishes the charges made against him.*] Testimony under oath by the officer himself that he went off his post for a short time on two different occasions, and that when ordered to the station house he said to the roundsman, who there made a complaint against him, "You lie," amounts to a confession of the charges of using disrespectful language to his superior officer, and that he did not properly patrol his post, and that he was absent therefrom. *Id.*

24. — *Action by a taxpayer against village trustees who have made excessive appropriations.*] A taxpayer in a village may properly maintain an action against the members of the board of trustees thereof, who have appropriated for the expenses of the village during a fiscal year \$6,700 more than the village charter allowed, and have ordered drafts for that amount to be drawn on the village treasurer. GERLACH v. BRANDRETH ..... 197

25. — *Injury peculiar to the taxpayer need not be shown.*] In such a suit it is not necessary for the taxpayer to show injury peculiar to himself from the act of the public officials. *Id.*

26. — *Long Island City* — chapter 141, Laws of 1896, relating to the tax on foreign insurance companies, is a "special city law" — it was not legally passed.] Chapter 141 of the Laws of 1896, providing that the percentage or tax to be paid by foreign fire insurance companies on insurance on property in Long Island City "shall be paid to a corporation to be hereafter formed, known as 'the Trustees of the Exempt Firemen's Benevolent Fund of Long Island City,'" comes within the designation of a "special city law," and not

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having been transmitted for acceptance by that city, under section 2 of article 12 of the Constitution of the State of New York, is void.

EXEMPT FIREMEN ASSN. *v.* TRUSTEES ..... 138

27. — *Payment of warrants of the general improvement commission of Long Island City refused, because of lack of funds—liability of the city of New York to an action for the amount thereof.*] Where warrants of the general improvement commission of Long Island City, presented on December 31, 1897, were refused payment because the city, which had issued only \$1,255,000 of the \$1,500,000 of bonds authorized to be issued for that purpose, then had no funds available for the payment of the warrants, an action for the amount of such warrants may be maintained against the city of New York, which on January 1, 1898, became, by virtue of chapter 378 of the Laws of 1897, the successor of Long Island City. KOELESCH *v.* CITY OF NEW YORK ..... 98

28. — *New York city—who are the "municipal authorities" thereof whose consent is necessary to the laying of gas mains through its streets.*] Since the passage of the Greater New York charter (Chap. 378 of 1897), the "municipal authorities" of that city, whose consent is made by section 61 of the Transportation Corporations Law (Chap. 566 of the Laws of 1890) a condition precedent to the laying of gas mains through the streets of a municipality, are the department of public buildings, lighting and supplies, and the department of highways, instead of the common council, which, prior to the passage of the act of 1897, constituted the "municipal authorities" referred to in the act of 1890. GHEE *v.* NORTHERN UNION GAS CO ..... 551

29. — *Greater New York charter—the distribution of the general school funds by the board of education on July 1, 1898.*] Section 11 of chapter 378 of the Laws of 1897 (the Greater New York charter) requires a distribution of the general school funds by the board of education, upon the basis prescribed by section 1065 of the charter, to begin on July 1, 1898.

MATTER OF SCHOOL BOARD ..... 49

30. — *Greater New York—a veteran appointed inspector of street cleaning of the city of Brooklyn subsequently transferred to the same department of Greater New York—power of the street commissioner to remove him.*] A veteran of the War of the Rebellion, holding through a civil service examination the office of inspector of street cleaning of the city of Brooklyn prior to January 1, 1898, under provisions of law forbidding his removal from office except for good cause shown after a hearing had upon due notice, who on January 3, 1898, is transferred to the department of street cleaning of the city of Greater New York, enters such employment, by operation of law, under the same conditions which surrounded his employment by the city of Brooklyn.

The provisions of section 537 of the charter of Greater New York, giving the commissioner of street cleaning of that city power in his discretion to remove any member of the uniformed force of street cleaners "on evidence satisfactory to him," do not apply to such inspector thus transferred, who is within the protection of section 127 of that charter providing for the retention of veterans "in like positions" and "under the same conditions" by the new corporation.

Such an inspector, after receiving notice on March 8, 1898, of his suspension from duty, was on the morning of the ninth served with a notice to appear before the commissioner of street cleaning in the afternoon of that day for a hearing; upon appearing before the commissioner he was sent to a subordinate officer for trial, where, without having had previous notice of the charges against him, or an adequate opportunity to meet them, he was confronted by two unsworn witnesses who testified to alleged facts constituting charges of neglect of duty, and he was thereafter dismissed by the commissioner.

*Held*, that such proceeding was in no sense a judicial investigation;

That it was improper to receive in such proceedings for removal the testimony of witnesses not given under the responsibility of an oath;

That the inspector was entitled to be reinstated in his position.

PEOPLE *EX REL.* SCHUMANN *v.* MCCARTNEY ..... 19

31. — *A veteran a subordinate officer in Brooklyn—not removable at pleasure by the officer of the city of Greater New York under whose direction he is after the*



**MUNICIPAL CORPORATION** — *Continued.*

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*consolidation.*] A veteran of the civil war, a subordinate public officer of the city of Brooklyn, not vested by statutory enactment with the performance of any independent duties, who continues to discharge his duties after the taking effect of the Greater New York charter in a subordinate position under the commissioner of water supply of the city of New York, is not subject to removal at the pleasure of the commissioner under section 1536 of the charter. **PEOPLE EX REL. TATE v. DALTON**..... 6

32. — *Remedy to prevent removal.*] The remedy of such veteran, in case of his summary removal from his position by the commissioner of water supply, and the position being filled by another incumbent, is not by mandamus, but by an action of quo warranto for his restoration to his office, his remedy being determined by the fact that he is a public officer and not by the fact that he is not an independent officer. *Id.*

— *Mandamus* — issued to compel a ministerial officer to pay where the right is clear, although there exists a remedy at law — prima facie case — what averments in an answer are insufficient — supervisory power of the comptroller of New York.

See **PEOPLE EX REL. BECK v. COLER**..... 167

— *Evidence* — a determination of police commissioners is not a "conviction" under section 832 of the Code of Civil Procedure, and section 714 of the Penal Code.

See **PEOPLE v. SULLIVAN**..... 544

— *Violation of a statute or municipal ordinance is evidence of negligence.*

See **STEWART v. FERGUSON**..... 515

**NASSAU** — County of Nassau — section 5 of chapter 588, Laws of 1898, providing for a board of supervisors of that county, is constitutional — such board may meet as a board of canvassers prior to January 1, 1899 — the remedy to prevent names being put on ballots is by mandamus, not by order.

See **MATTER OF NOBLE**..... 55

**NEGLIGENCE** — A passenger on a street car killed by being thrown over the dashboard — a change in his testimony made by a witness on a second trial, the probable cause of the accident and the fact that the deceased was standing on the platform, all present questions to be decided by the jury.] 1. In an action brought to recover damages arising out of the death of a passenger who, while riding upon the front platform of a street railroad car, was thrown over the dashboard, a witness testified that the jerk was as if the driver had put the brake on and then let it go, or as if there was a rock or something on the car track, and this, being the sole evidence on the question of negligence, was held on appeal from a judgment in favor of the plaintiff to be insufficient to show negligence upon the part of the defendant. On a second trial the same witness testified that he saw the driver put on the brake as quickly as he could, and then suddenly let it go again; and another witness, not examined upon the first trial, also testified that he saw the driver put the brake on suddenly, and that the plaintiff's intestate was thrown over the dashboard.

*Held*, that, even if the court were of opinion that the first witness had amended his testimony to fit the opinion of the General Term upon the previous appeal, that fact would not authorize the court to take the case away from the jury, as it was simply a fact to be considered by the jury in weighing his evidence;

That it was also a question for the jury whether it was a physical impossibility that the accident could have happened if the brake were suddenly put on and as quickly let go;

That if the driver had made this sudden and unusual application of the brake, by which the deceased was thrown over the dashboard of the car, it was incumbent upon the defendant to excuse this extraordinary management of the car by showing the existence of some emergency which appeared to require such prompt and decisive action;

That the fact that the deceased was standing upon the front platform of the car, and that snow had previously fallen, rendering everything some-

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what slippery and slushy, did not, in view of the fact that he was smoking, and that it was the custom of the defendant to allow smoking upon the front platform, constitute, as matter of law, conclusive evidence of contributory negligence, it being a question for the jury to determine whether from the evidence any reasonable excuse had been offered for his being there. *BRADLEY v. SECOND AVENUE R. R. Co.*..... 284

2. — *A master is liable for an injury to his servant occasioned by a defective scaffold*—*Labor Law, 1897, chapter 415, § 18.*] Prior to the enactment of the Labor Law (Chap. 415 of the Laws of 1897) the rule was well established that a scaffold erected for workmen is not a place in which their work is to be done, within the meaning of the rule requiring the master to furnish a suitable place in which to do his work, but is an appliance or instrumentality by means of which the work is to be done, and that, if the master furnishes proper material for the scaffold, he is not liable to his workman for the negligent act of one of his employees in building it; but since the enactment of section 18 of that law, the scaffold is regarded as a place furnished by the master upon which the servant is to work, and the duty has devolved upon the master not to permit that place to be unsafe, unsuitable or improper. A servant of the master, in building the scaffold, acts as the master himself.

An employee required to use the scaffold is not called upon to inspect it in order to ascertain if it is safe; he has a right to assume that the master has performed his duty in that regard. *STEWART v. FERGUSON.*..... 515

3. — *Violation of a statute or municipal ordinance—contributory negligence.*] The violation of a statute or of a municipal ordinance which causes an injury to any person is *prima facie* evidence of negligence on the part of the law breaker, which affords sufficient reason for charging him with liability for an accident; but such liability on his part exists only where the violation of the law can be said to have been in some way, or to some extent, the cause of the injury; and where an accident occurs through the breaking of a scaffold, by reason of which an employee falls through five floors and is killed, the fact that the master has not complied with section 20 of the Labor Law, requiring that the floors of the building shall be filled in to within three tiers of beams, does not constitute negligence which renders him liable for the accident.

*Semble*, that in such case, as the fact that the floors had not been filled in as the law required was perfectly apparent to the employee who was killed, he, by consenting to work upon the scaffold above the place where these openings were, assumed the risk and was guilty of contributory negligence. *Id.*

4. — *Presumption of negligence from the fall of a trolley wire into the street—proof by interested witnesses of the use of proper materials—automatic device not in working order.*] In an action brought to recover damages for injuries sustained by a person who, while passing along a street, received a shock of electricity from a trolley wire, used in connection with the defendant's electric railroad, which broke and fell to the ground and the current from which twice shocked her person, proof by the defendant which, in addition to establishing the use of proper material and care in construction, showed that it had a system of inspection under which its trolley wire and the supports were carefully examined at least once in every four days, and, in addition thereto, that the wire which broke and the supports in connection therewith were inspected the day before the wire broke and found to be in perfect order, does not overcome the presumption of negligence created by the falling of the wire: *First*, where such proof rests for its support upon the testimony of interested witnesses, charged by the railroad company with the discharge of these duties, and, *second*, where it appears that the company employed a device, called a breaker system, which, when properly constructed and in proper working order, would throw the current off the wire the moment it came in contact with the ground, as the jury would be authorized to find that this automatic device at the time of the accident was either not properly adjusted or was not in proper working order.

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5. — *Injury from fright.*] While injuries resulting from fright alone do not authorize a recovery, yet where physical injury accompanies the fright it furnishes a basis for a recovery. *Id.*

6. — *Accident on a passenger elevator having a door operated by a button in the floor—proof of notice of the dangerous construction of the door and of similar accidents—negligence of the master co-operating with that of a fellow-servant of an injured employee.*] A corporation owning a large office building in the city of New York equipped a passenger elevator therein with a heavy iron door which opened when the elevator man pressed a button in the floor of the car with his foot, and closed with force when the pressure was removed, it being impossible, after the door commenced to close, to stop it by again pressing the button.

In an action against the corporation by an employee thereof to recover damages for personal injuries sustained by him in consequence of being caught by the door, which suddenly closed while he was attempting to enter the elevator,

*Held*, that proof that the superintendent of the building had complained of the door to the defendant's president, and that at least one other person had been caught by the door in substantially the same way that the plaintiff had, was competent, and that if given it presented a question for the jury whether an elevator door so constructed that if the operator was pushed or jostled by the persons riding in the car, or if he inadvertently or carelessly removed his foot from the button, the door was at once freed from his control and was likely to produce injury to a person entering the car, was a safe appliance to be used under the circumstances;

That, assuming that the plaintiff was a fellow-servant of the elevator man, and that the accident resulted from the negligence of the latter in removing his foot from the button, such facts would not be fatal to the plaintiff's recovery, as a master is liable in case his negligence co-operates with that of a co-servant in producing injury to an employee.

AULD v. MANHATTAN LIFE INS. CO. . . . . 491

7. — *The driver of a wagon on the tracks of an electric railroad injured by a collision with a car approaching from the rear—his failure to look back constitutes contributory negligence.*] The driver of a market wagon, while driving on a dark evening through a suburban district on the track of an electric railroad with which and with the operation of the cars thereon he was familiar, was overtaken by one of the cars at a point where there were no artificial lights with the exception of two or three about a neighboring building, and where the roadway outside the tracks was too narrow to permit of driving, and in the collision he was thrown from his seat and injured. Although he had been driving on the tracks for a mile or more he had not once looked behind him, and the first intimation that he had of the approach of the car was some one calling to him from behind to get out of the way and while attempting to turn his team into the other track he was struck.

In an action brought to recover for the injuries thus sustained,

*Held*, that the plaintiff had failed to establish the absence of contributory negligence on his part, and was not entitled to recover;

That, while the railroad company owed to the plaintiff the duty of using reasonable care in the operation of its cars to prevent a collision, the plaintiff could not enter upon the tracks of the defendant and rely upon the defendant's servants seeing him in time to give him warning of the approach of a car. JOHNSON v. BROOKLYN HEIGHTS R. R. Co. . . . . 271

8. — *Injury caused by the jolting of an elevator—when no neglect is shown on the part of the persons maintaining the elevator.*] In an action brought by an employee to recover damages for injuries sustained while riding in an elevator maintained by her employers, the plaintiff's theory was that a jolt or "wobbling" of the elevator, which was one of the concurring causes of the accident, resulted from the fact that the space between the shoes of the elevator car and the guides in the elevator shaft was too great, and that it was negligent and careless to use the elevator in that condition.

It appeared that four months before the accident new shoes and new guideways had been put in and lined up, the space between them not being more than was necessary to give it play; that in the ordinary course of the

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use of the elevator it would take two years for any considerable shrinkage to occur; that the elevator was inspected two months before the accident, and was then found to be safe for use, and there was nothing to show that from the time of such inspection down to the time of the accident anything happened to the elevator which would attract the attention of the defendants or their servants to any change in the condition of the elevator that would render it unsafe in any particular.

*Held*, that the proof did not establish any remissness or neglect upon the part of the defendants in the maintenance of the elevator, and that a verdict in favor of the plaintiff could not be sustained.

MONTGOMERY v. BLOOMINGDALE..... 375

9. — *A passenger standing upon the running board of a street car injured because of a sudden jerk—liability of the railroad company.*] A passenger upon an open electric car, which was crowded to such an extent that all the seats were occupied, and passengers were standing in the space between the seats and upon the running board, took a position upon the running board, as was customary upon the railroad in question when the cars were crowded, although he might have stood in the space between the seats. The conductor collected his fare and made no suggestion that it was improper or dangerous for the passenger to ride upon the running board, and while the car was running at the rate of from six to eight miles per hour the passenger was thrown from the car and injured because of a sudden violent jerk, which the evidence, in an action brought against the railroad company by such injured passenger, justified the jury in finding might have been occasioned by the sudden application of the motive power.

*Held*, that the question whether the passenger was guilty of contributory negligence in remaining upon the running board was one of fact for the jury;

That the jury were justified in determining that the jerk given the car was the result of a negligent act. HASSEN v. NASSAU ELECTRIC R. R. Co... 71

10. — *A person, not a passenger, falling upon the steps of a railway station in consequence of a banana thrown thereon—alleged failure to sufficiently light the steps.*] A person who had visited a railroad station for the purpose of obtaining a meal at the restaurant (not a passenger upon the railroad, nor intending to become one), while leaving the station with his wife at about eight o'clock in the evening by a door through which on the same day he had already passed four or five times, opposite to which in the station there was a large electric light, and over the platform outside of which there were also two large electric lights, stepped upon a banana which had been thrown upon the steps and which, by reason of the shadow caused by their bodies, which filled up the doorway, he was prevented from seeing, and fell and was injured.

It was not claimed that the railroad company was responsible for the presence of this banana on the steps, the sole ground of liability upon its part being its alleged failure sufficiently to light the steps.

*Held*, that the railroad company performed its duty if it provided a safe means of egress from the station, in respect to which there was, in this case, no evidence of negligence on its part.

HAUK v. NEW YORK, N. H. & H. R. R. Co..... 434

11. — *Street railroad—passenger killed by falling from the step of a street car—duty of a railroad company toward persons about to board its cars temporarily stopped.*] In an action to recover damages for the death of the plaintiff's intestate occasioned by his falling from a street railroad car, which the evidence on behalf of the plaintiff showed had stopped on a curve because of a wagon in front of it, and was suddenly started while the intestate was attempting to board it, the conductor of the car testified as follows: "I saw the man make for the car and the car in motion. I hollered to him to look out for himself. He got on, his two feet on the step, and his hand slipped off the hand rail, and he fell and his head struck the ground first. I saw him jump on the car while it was in motion as it was passing around the starter's booth."

*Held*, that the judge properly charged the jury, in substance, that liability might be imputed to the railroad company if the conductor, in the exercise of reasonable care, ought to have seen whether or not any one was about to

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get on the car while it was temporarily stopped by reason of the obstruction in front of it. *DEAN v. THIRD AVENUE R. R. Co.*..... 220

12. — *Defect in the stairs of a tenement house—constructive knowledge thereof on the part of the landlord.*] Although in an action brought by a tenant of a tenement house against the landlord to recover for injuries sustained from a fall, occasioned by a defect in the rubber facing on one of the steps of the stairs, which there was evidence tending to show had existed for a week, there is no proof that the landlord had actual notice of such defect, yet, when he testifies that he collected the rents for the premises and, as he lived next door, visited them every day, attending to the repairs, and a janitress employed by him to sweep the stairs and light the lamps testifies that she went up and down the stairs every day, the jury may properly, despite the denial of both witnesses that the stairs were in a bad condition, find with the plaintiff that the landlord should have known of the defect. *NADEL v. FICHTEN*..... 188

13. — *Obligation of a landlord to light the halls and stairways.*] *Scoble*, that the landlord of a tenement is not under any legal obligation to light the halls or stairways therein. *Id.*

14. — *Collision between an electric car and a wagon upon the tracks ahead of the car—failure of the motorman to give timely warning, and of the driver of the wagon to look back.*] In an action against a railroad company to recover damages for personal injuries caused by one of the defendant's electric cars running into the rear of a wagon driven by the plaintiff upon the defendant's tracks, a charge by the court that the plaintiff "had the right to assume that they (the railroad company) would give him timely warning of its approach—the motorman," is improper, as no absolute duty to give warning under all circumstances is imposed upon the company.

Whether in such a case the company was guilty of negligence in not giving timely warning, and whether the plaintiff was guilty of contributory negligence in not looking backwards to discover the approach of the car, are questions of fact for the jury to determine under all the circumstances of the case. *DEVINE v. BROOKLYN HEIGHTS R. R. Co.*..... 248

15. — *An employee assumes the risk of walking through a passageway in which baskets are stored.*] A servant who continues in the master's employ, knowing that baskets on wheels are generally left standing in a passageway in the master's establishment, through which he is obliged to pass in going from his work, thereby assumes the risk incident to their presence in the passageway, and waives any claim for damages in case he is injured in a collision with one of such baskets. *DORNEY v. O'NEILL*..... 497

16. — *Sudden extinguishing of the lights—it must be shown to be due to some fault of the master.*] The fact that the collision occurred at a time when the passageway was in darkness, because for some unexplained reason the electric lights with which the passageway was usually lighted had gone out, will not sustain a recovery by the servant in the absence of evidence establishing that the extinguishing of the lights was due to some personal fault, or the equivalent thereof, upon the part of the master. *Id.*

17. — *Injury to a child necessitating amputation of one of its legs—where the trial court has not disclosed its real judgment a verdict for \$15,000 will not be set aside by the Appellate Division.*] In an action to recover damages occasioned by the injury of a child through the alleged negligence of a railroad company, necessitating the amputation of one of his legs above the knee, a verdict of the jury for \$15,000 will not be set aside by the Appellate Division as excessive, where the trial court has, in the exercise of its inherent discretionary power, felt itself constrained by precedents in other cases to deny an application to set aside the verdict as excessive, and the Appellate Division is not, therefore, able to determine what the real judgment of the trial court was upon the facts of the case.

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18. — *Fall of an iron plank between a car and a station platform—liability of the railroad company for an injury occasioned thereby to an employee.*] A railroad company which has provided an iron plank of sufficient length, width and strength to facilitate the unloading of freight from a car to a sta-

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tion platform, is not liable for injuries sustained by an employee who, while stepping thereon preparatory to assisting in the work, is injured in consequence of the plank falling to the ground between the car and the platform, simply because, as he alleged, it was not supplied with hooks or other fastenings which would prevent it from slipping from its place, although it is shown that the plank had fallen on other occasions.

D'ARCY v. LONG ISLAND R. R. Co. .... 275

19. — *Passenger injured in a collision in which a street railroad car is run into by a wagon — liability of the railroad company.*] A street railroad company is not necessarily freed from liability to a passenger injured in a collision between one of its cars and a wagon, because the wagon struck the car instead of the car striking the wagon. *KEEGAN v. THIRD AVENUE R. R. Co.* 297

20. — *When it is the duty of a railroad company to use the highest degree of care.*] The question whether a street railroad company is called upon to exercise "great care and vigilance, all that human foresight might suggest," depends upon the conditions existing at the time. *Id.*

21. — *Railroad — expert evidence as to the effect of the use of paint upon a push stick.*] The admission in evidence, upon the trial of an action to recover damages for personal injuries resulting from the alleged negligence of the defendant, a railroad company, of the opinions of experts to the effect that the result of painting a push stick is to obscure defects therein, does not constitute reversible error, even though such evidence was inadmissible, as the experts informed the jury only what the jurors should have known and undoubtedly did know. *MILLER v. ERIE R. R. Co.* .... 217

22. — *What is not an excessive verdict.*] In such an action a verdict of \$8,500 for the plaintiff, who, as the result of the accident, had a badly broken jaw which was not only very painful, but would be permanent, disfiguring his face for life, is not excessive. *Id.*

23. — *Evidence of ownership of premises set on fire by sparks from a locomotive.*] In an action commenced in 1896 to recover damages resulting from a fire on the plaintiff's premises, alleged to have been kindled by sparks emitted from the defendant's (a railroad company's) engine, the jury may properly conclude that the property in question belonged in fact to the plaintiff, where he produces deeds dated in 1878, 1880 and 1882, and gives evidence disclosing facts indicating ownership reaching back to about the time that the deeds were executed, and where the property was inclosed by fences. *VAN INWEGEN v. PORT JERVIS, M. & N. Y. R. R. Co.* .... 95

24. — *Action for personal injuries — proof required to justify the allowance of damages for the expense of medical attendance past and future.*] In an action to recover damages for personal injuries the plaintiff is only entitled to nominal damages for the expense of medical attendance, in the absence of evidence showing what the medical attendance was and the amount of it; and where a claim is made for future pecuniary loss on account of expenses to be incurred for medical services, evidence should be given showing a reasonable certainty that such services will be needed, their probable duration, their character, their frequency and their value.

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**NEGOTIABLE PAPER** — *Law relating to.*

See **BILLS AND NOTES.**

**NEW TRIAL** — *On the ground of newly-discovered evidence — what evidence justifies it — it may be granted after appeal taken and judgment affirmed — laches.*] 1. The rule which formerly obtained, that where newly-discovered evidence was cumulative a motion for a new trial based thereon should be denied, has been, in furtherance of justice, virtually abolished.

The proper inquiry is whether the newly-discovered evidence, whether cumulative or not, is of such a character that it is likely to produce a different result upon a new trial.

In an action to recover on a *quantum meruit* five per cent on the cost of a building for services rendered by the plaintiff as an architect, in which the

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plaintiff recovered judgment, the defendant testified that a draft contract handed to him by the architect contained the words "two per cent," and produced on the trial a carbon copy in which the word "two" was inserted in a blank, directly from the ribbon of the machine. The plaintiff testified that when he handed the draft contract to the defendant the word "two" was not inserted, but that there was a blank before the words "per cent." On a motion subsequently made by the defendant for a new trial, upon the ground of newly-discovered evidence, an affidavit of a stenographer, whose name and whereabouts were unknown to the defendant at the time of the trial, was produced in which she stated that, at the plaintiff's request, she filled in the word "two" in the contract.

*Held*, that the motion should have been granted, as, in view of this statement of the stenographer, the jury might come to an entirely different conclusion from that which they reached, when it appeared that this insertion of the word "two" might have been, and apparently was, made by the defendant after the proposed contract was handed to him;

That such statement of the stenographer was not impeaching evidence assailing the general credibility or otherwise weakening the force of the plaintiff's testimony, as it merely tended to establish a different state of facts from that testified to by the plaintiff, upon which he founded his claim, and thus contradicted, but did not impeach, him;

That the objection that the defendant had been guilty of *laches*, in that he did not make a motion to postpone the trial or to withdraw a juror because of the surprise, was not a valid one, inasmuch as the mere fact that he was surprised, he knowing at the time of the trial nothing concerning the origin of this draft contract, or the manner of its production, or what the stenographer's statement would be in regard to it, afforded no ground whatever on which to move for a postponement thereof; and that the fact that an appeal had been taken and the judgment had been affirmed, afforded no reason why a new trial should not be granted in the interests of justice.

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2. — *Motion therefor on the ground of newly-discovered evidence—proof of an oral agreement contemporaneous with a deed and to the same effect.*] In an action on certain notes the answer admitted the defendant's indebtedness, but alleged the conversion by the plaintiff of certain bonds held to secure their payment, and it was decided by the Court of Appeals, in affirmance of the judgment of the trial court, that the burden of proof being upon the defendant to show that the bonds in question were not held by the plaintiff as collateral security for any obligation of the defendant other than the notes in suit, and there being evidence tending to show the possession by the plaintiff of certain notes of one Read which had been guaranteed by the defendant, the conversion had not been established.

*Held*, that a motion for a new trial on the ground of mistake and surprise, and because of newly-discovered evidence—based on the affidavit of Read that prior to the trial of the action he had conveyed certain land to the plaintiff by an instrument in writing, and under a contemporaneous oral agreement to the same effect, by which the plaintiff covenanted to discharge the indebtedness to himself, evidenced by the Read notes, as part consideration for the conveyance of the property, which fact was concealed from the defendant by both parties to the deed and was not known to him until shortly before the motion was made—should be granted.

In such a case the contemporaneous parol agreement is admissible in evidence, it being a mere restatement of the legal effect of the writing signed by the parties, not tending to vary the written agreement, but rather to supplement it, and thus show their real agreement. STOKES v. STOKES..... 423

— *Evidence—when the admission of letters between the parties not relating to the subject of the action requires a new trial.*

See HOAG v. WRIGHT..... 260

**NEW YORK CITY—Supervisory power of the comptroller of New York.]**

The comptroller of the city of New York, in the absence of fraud or illegality, has no general supervision over the conduct of other officers or departments of the city. PEOPLE EX REL. BECK v. COLER..... 167

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*See* STEMMER v. THE MAYOR..... 408
- *Failure to file with the corporation counsel notice of an intention to bring an action against the city — what does not excuse or waive such failure.*  
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*See* CONSTITUTIONAL LAW.

**NEWLY-DISCOVERED EVIDENCE:**

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**NOTICE** — *City of New York* — failure to file with the corporation counsel notice of an intention to bring an action against the city — what does not excuse or waive such failure.

*See* KENNEDY *v.* THE MAYOR..... 311

— Contract for work — insufficiency of proof of the service of notice to the contractor to begin work as the basis of a set-off for delay.

*See* DWYER *v.* THE MAYOR..... 450

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*See* NADEL *v.* FICHTEN..... 188

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*See* WISSEL *v.* OTT..... 159

**OFFICER** — Conspiracy — sufficiency of an indictment alleging an agreement between a public officer and a private person by which the officer is to violate his duty — specification of the time — allegation that "Theodore B. Willis, as commissioner of city works," entered into a conspiracy.

*See* PEOPLE *v.* WILLIS..... 203

— Greater New York charter, section 1878 — assistant clerk in a court of a justice of the peace in the city of Brooklyn — when his term expires — not affected by any action of the board of estimate and apportionment.

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— A veteran a subordinate officer in Brooklyn — not removable at pleasure by the officer of the city of Greater New York under whose direction he is after the consolidation — his remedy to prevent removal.

*See* PEOPLE *EX REL.* TATE *v.* DALTON..... 6

— Greater New York — a veteran appointed inspector of street cleaning of the city of Brooklyn subsequently transferred to the same department of Greater New York — power of the street commissioner to remove him.

*See* PEOPLE *EX REL.* SCHUMANN *v.* MCCARTNEY..... 19

— New York city — claim against it, under chapter 543, Laws of 1894, for the unpaid salary of a District Court judge — what is not a sufficient compliance with the act.

*See* STEMMLER *v.* THE MAYOR..... 408

**OFFSET:**

*See* SET-OFF.

**ORDER** — For the payment of money.

*See* BILLS AND NOTES.

**PARENT AND CHILD** — Adopted child — right to inherit a sum payable on the death of a member of the New York Produce Exchange. 1. A by-law of the New York Produce Exchange which provides that "Should a member die \* \* \* if he leave children and no widow, then the whole sum shall be paid to the children. \* \* \* Should the member die leaving neither widow nor children, then the whole sum shall be paid to the next of kin of the deceased, within the limit of representation prescribed by the statutes of the State of New York," passed subsequently to the enactment of chapter 830 of the Laws of 1873, providing that a child adopted thereunder, and the person adopting him, should thenceforth "sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation, except the right of inheritance," creates in favor of an adopted child of a member who died in 1898, leaving no widow or children or remote issue and without next of kin other than such child, a right to the payment of the sum payable on the death of such member.

*It seems, that the adopted child might claim the fund under the provisions of chapter 703 of the Laws of 1887, as the next of kin, within the Statute of Distributions as modified by that act, although not considered as the child of the deceased member within the meaning of the by-law —*

**PARENT AND CHILD** — *Continued.*

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the by-law being intended to be construed under the statutes of the State as they existed at the member's death.

**KEMP v. NEW YORK PRODUCE EXCHANGE** ..... 175

2. — *Agreement by a party to make a child his heir and give him a son's interest in his estate — right of the child thereunder.*] Where a party, who has since died intestate, has, with the consent of his wife, entered into an agreement with the mother of an infant, whose father was dead, to make the child "an heir" and "to give him the same interest which a son would have in whatever property he owned or might have at the time of his decease," the child is entitled to such a share of his estate as a son would be entitled to as an heir, if the estate were divided among such children as the intestate might have at the time of his death, and where the intestate has died without issue or descendants the child is entitled to the whole estate, subject to the dower interest therein of the widow of the intestate.

**GATES v. GATES**..... 608

3. — *A statement in a complaint that the plaintiff was an heir at law is a mere conclusion, not an independent cause of action.*] An averment in a complaint in an action brought by the child, setting forth the contract and his rights thereunder, and also setting forth that he was the only heir and, therefore, entitled to the possession of the property, sets forth only a cause of action which is based upon the contract — the statement that the plaintiff was the only heir and, therefore, entitled to the possession of the property being a mere conclusion. *Id.*

4. — *Chapter 531 of the Laws of 1895 — assumption by the court that the plaintiff's father died subsequent to its passage.*] Chapter 531 of the Laws of 1895, by which a child born out of wedlock is made legitimate by the subsequent marriage of its parents, is not operative to divest any title acquired prior to its enactment, but where, on an appeal by a defendant from a judgment in favor of a plaintiff coming within the provisions of that act, the record is silent on the question as to whether the plaintiff's father died prior to or after the enactment of that statute, the court will assume that the death occurred subsequent to it and sustain the plaintiff's right as heir.

**WISSEL v. OTT**..... 159

— *Release executed by a mother to her son — what evidence will rebut the presumption of undue influence.*

*See* **FERRIS v. FERRIS**..... 144

**PARTITION** — *An interlocutory judgment should provide for an apparent existing lien — the question as to who was the judgment debtor will not be determined on affidavits — who is not a bona fide purchaser.*] In an action for the partition of land, in which the complaint averred that the share of one of the parties was subject to the lien of a judgment in favor of another party thereto, an answer, served by a company claiming to be the assignee of the judgment (although the assignment did not appear of record), was returned by the plaintiff upon the ground that the company was not a party to the action, and an interlocutory judgment was subsequently entered, excluding the judgment as a lien and making no provision for its payment.

*Held*, that such interlocutory judgment was in direct violation of the provisions of section 1563 of the Code of Civil Procedure, and that the assignee was entitled to have it set aside upon motion;

That, assuming that affidavits might be filed after the entry of the interlocutory judgment to cure the irregularity existing therein, the affidavit of the alleged judgment debtor, showing that he was not the party defendant in the action in which the judgment in question was obtained, was not available in support of such interlocutory judgment, where such affidavit was repudiated by the affiant, who claimed that he never made it, and he was supported in this respect by another affiant, as, under such circumstances, the question should not be determined upon affidavits;

That, as the irregularity in the interlocutory judgment appeared upon the face of the proceedings, a purchaser of the property at the sale had under such judgment did not stand in the position of a *bona fide* purchaser for value, nor was she entitled to protection as such. **KELLY v. WERNER**..... 68

**PARTNERSHIP** — *Evidence establishing the partnership relation.*] 1. In an action to procure a dissolution of a partnership and an accounting, it appeared that the plaintiff had entered the employment of the defendant at a salary, with the expectation on the part of both of their ultimately forming a partnership in the business then carried on by the defendant; that the plaintiff subsequently demanded that the defendant should comply with his promise and admit him to partnership, and thereafter renewed his demand that he should have a half interest in the business, to which the defendant replied: "All right, you shall have it on the first of January," the terms of the agreement being that the plaintiff should pay for such half interest \$5,000 in monthly installments, to be deducted from his half of the proceeds of the business. No written articles of copartnership were then prepared, and on the first of January the defendant stated that he had not had time to prepare the articles, but that the partnership could continue from that time, and he would have the articles prepared, which he did in the succeeding April, and submitted them to the plaintiff, who refused to sign them, claiming that they did not embody the whole agreement.

In March of the next year, a lease for ten years of a building in which the business was to be carried on was executed by both the parties as their joint act; and the plaintiff, after the first of January, drew for some three years from the earnings of the business a sum considerably in excess of his previous salary.

*Held*, that the circumstances justified the conclusion that a partnership relation existed between the parties. **SOLOMONS v. RUPPERT**..... 280

2. — *Effect of a testator's leaving part of his estate in the business of a firm.*] A testator, by leaving a portion of his estate in the business of a firm in which he was a member, with directions that his two sons, his previous partners, should continue to conduct the business on behalf of themselves and of his estate, does not put his general estate at the risk of the business so conducted after his decease, and his executors, in their representative capacities, do not become partners or liable for the conduct of the business of the firm. **ZIMMER v. CHEW**..... 504

— *Debtor and creditor — the fact that a wife assists a husband in his business and speaks of the business as their business, etc., does not make her liable for goods sold for use in the business.*

*See* **BLAUT v. FLETCHER**..... 383

**PARTY** — *Receiver appointed in supplementary proceedings — his rights as against an assignee of the debtor — his substitution in a pending litigation — rights of the attorney in such suit.*

*See* **FITZPATRICK v. MOSES**..... 242

— *Fire insurance — a policy insuring the owner and also contractors "as interest may appear" — complaint by the contractors which sets forth an insurable interest.*

*See* **SULLIVAN v. SPRING GARDEN INS. CO.**..... 128

— *Action against tortfeasors — they are severally liable — a failure to serve one is not a ground for striking the case from the calendar.*

*See* **RAPPAPORT v. WERNER**.. 525

— *Lloyds policy of insurance — an action to enforce it may be brought against the general manager at the time of the loss.*

*See* **WHEELOCK v. CHAPMAN**..... 464

**PAYMENT** — *Delivery by a vendee to his vendor of checks stated to be in full payment — retention of the checks by the vendor, who states that he will accept them upon account.*] A vendee of a quantity of onions refused to accept them on the ground that they did not conform to the terms of the contract of purchase, and, by direction of the vendor, sold them for the latter's benefit and on his account, and remitted the proceeds of such sale to him by two checks, one stated to be "In full payment on onions shipped Apr. 20th," the other "In full payment 2 cars onions, 13173 and 50335."

The first check was indorsed by the vendor and collected, and the second was indorsed by him "Accepted on account, Ralph Wisner," and was also collected.

**PAYMENT** — *Continued.*

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The vendor acknowledged the receipt of the first check in a letter to the vendee stating that he would give the vendee credit for its amount and would look to him for the balance of \$399, which would have been the amount due from the vendee if he had accepted the onions. The vendor also acknowledged the receipt of the second check in a letter to the vendee which stated that he had given the vendee credit therefor and that he looked to him for the balance.

*Held*, that the retention of these two checks by the vendor and the collection of the money thereon under the circumstances operated to relieve the vendee from any liability by reason of his rejection of the onions, whether that rejection was, in the first instance, justifiable or not.

WISNER v. SCHOPP..... 199

— *Application of payments—proof required of a surety.*

See FULTON GRAIN & MILLING CO. v. ANGLIM..... 164

**PENAL CODE** — § 714 — *Evidence — a determination of police commissioners is not a "conviction" under section 832 of the Code of Civil Procedure, and section 714 of the Penal Code.*

See PEOPLE v. SULLIVAN..... 544

[See table of sections of the Penal Code cited, *ante*, in this volume.]

**PERFORMANCE** — *What proof can be made under a plea of.*

See PLEADING.

**PERSONAL PROPERTY** — *Conversion of chattels by a sheriff—proof as to its effect on the owner's customers and business.*] 1. Where personal property has been levied upon by the sheriff, under an execution against a party not the owner, the latter, in an action brought by him for its conversion, is not entitled to testify that there were customers in his store where the property was, who saw it being taken by the sheriff; that he had but a small business and little capital, and that the removal of this part of the stock practically destroyed his business in the articles taken.

MONTIGNANI v. CRANDALL COMPANY..... 228

2. — *The price on an execution sale is some evidence of value.*] The price realized upon a sale of property under an execution is some evidence of its value. *Id.*

— *Sale of.*

See SALE.

**PHYSICIAN** — *Action for personal injuries—proof required to justify the allowance of damages for the expense of medical attendance past and future.*

See PAGE v. DELAWARE & HUDSON CANAL CO..... 618

**PLACE OF TRIAL:**

See VENUE.

**PLEADING** — *Motion for leave to serve an amended reply to a counterclaim—when not too late.*] 1. A plaintiff is not guilty of laches in delaying to make a motion for leave to serve an amended reply to a counterclaim for professional services set up in the answer, by substituting for a denial that such services were reasonably worth over the sum of \$400, an allegation that such services as rendered were worth no more than \$100, until after the completion of the defendant's testimony, notwithstanding the fact that the defendant moved for judgment upon his counterclaim for professional services at the close of the plaintiff's case, upon the ground that the reply was not sufficient to put in issue the performance thereof by the defendant or the value of such services, and that such motion was sustained.

*Semble*, that the proper time to present such a question is at the close of the defendant's case. WOOLSEY v. SHAW..... 405

2. — *A claim that the reply was sufficient does not preclude it—an amendment not allowed to present an objection not raised in the original reply.*] The plaintiff is not estopped from making an application at Special Term for leave to amend, because he has claimed at the trial before the referee that the reply was sufficient, but he should not be permitted to amend the reply by

**PLEADING** — *Continued.*

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inserting an allegation that the services alleged in the bill of particulars, as constituting the services specified in the counterclaim, were performed and rendered at the request and under the direction of persons other than the plaintiff's testator, there having been no intimation of such an objection to the defendant's claim in the original reply. *Id.*

3. — *Leave to sue as a poor person* — petition establishing a *prima facie* case.] A petition, on an application for an order authorizing the petitioner to sue *in forma pauperis*, which alleges the facts upon which the action is to be based, and the poverty of the petitioner, establishes a *prima facie* case for the granting of the order. *YOUNG v. NASSAU ELECTRIC R. R. Co.* ..... 126

4. — *Effect of a decision adverse to the plaintiff in a previous action for the same cause.*] On an application by the defendant, in such an action, for the vacation of such an order, the court may properly consider, as bearing upon the merits of the plaintiff's right to sue *in forma pauperis*, the fact that in a previous action for the same cause there have been two trials, the first ending in a disagreement of the jury, and the second in a dismissal of the complaint at the close of the plaintiff's case, upon which a judgment was subsequently entered for costs, which the plaintiff has not paid. *Id.*

5. — *Bill of particulars not granted in an action for alienating a husband's affections by depreciating his wife.*] A bill of particulars should not be granted in an action brought by a wife, in which she charges her husband's uncle with no other improprieties than that he had alienated her husband's affections and had broken up her home by a continued depreciation of the plaintiff as a wife. *KIRBY v. KIRBY*..... 25

— *Fire insurance* — a policy insuring the owner and also contractors "as interest may appear" — complaint by the contractors which sets forth an insurable interest — the policy creates separate contracts — setting forth the policy in the complaint.

See *SULLIVAN v. SPRING GARDEN INS. CO.* ..... 128

— *Contract of sale providing for a test to be made by a person named* — agreement that the test should be made by another — proof of such agreement by the vendor under a complaint alleging performance.

See *HUBBARD v. CHAPMAN* ..... 252

— *A statement in a complaint, based on an agreement by a party to make a child his heir, that the plaintiff was an heir at law is a mere conclusion, not an independent cause of action.*

See *GATES v. GATES* ..... 608

— *Complaint in an action for libel* — criticism of a picture — a libel must relate to professional character generally, not to a particular work.

See *BATTERSBY v. COLLIER*..... 347

**PLEDGE** — *Of a life insurance policy* — waiver by the pledgee of his right to dispose of it without notice — consideration for the waiver.] 1. Where a life insurance policy has been pledged as collateral to a promissory note under an agreement that, in case of default in payment, "the legal holder of the said promissory note is hereby authorized to surrender to the company said policy, or to sell the same without demand and notice at public or private sale or otherwise," the right to dispose of the policy without notice may be waived by a subsequent understanding of the parties after default in payment, the legal effect of which is to entitle the pledgor to a notice before the pledgee may dispose of the policy.

*It seems, that a consideration is not necessary to sustain such waiver.*

See *TOPLITZ v. BAUER* ..... 526

2. — *Damages recoverable where the policy is surrendered.*] Where, in such case, the policy has been surrendered in consideration of the payment of a certain sum by the company to the pledgee while the insured is suffering from an incurable disease, from which he soon thereafter dies, and the surrender has involved the loss of the whole amount of the policy over and above the amount of the debt — it being impossible at the time of the surrender to obtain in a responsible company another insurance policy upon the life of the dying man — the pledgor is entitled to recover of the pledgee the face value of the policy at the time of its surrender, with interest from that date. *Id.*

**POLICE** — *In cities.*

See MUNICIPAL CORPORATION.

**POLICY** — *Of insurance.*

See INSURANCE.

**POWER** — *Will — an absolute power of sale is not limited by the suggestion of a time for its exercise — effect of the time of its exercise not being limited by lives — its exercise postponed for the convenience of the estate.*

See CHANLER v. NEW YORK ELEVATED R. R. Co ..... 805

**PRACTICE** — *Review of an alleged adjudication by certiorari — who is an aggrieved party entitled to the writ.] A person who is deprived, by the discontinuance of the street, of the only direct way to reach the shore of a harbor, which is about two blocks distant from his dwelling, and is thereby "compelled to make a considerable detour to the north in order to reach the same, and by reason thereof he is put to great inconvenience and the value of his property is materially lessened," is a party aggrieved by the determination and is entitled to review the same by certiorari.*

It is not necessary, in order to make him a party aggrieved, that the action of the village board should be such as to entitle him to maintain an action for damages. PEOPLE EX REL. MERSHON v. SHAW ..... 61

— *Committee of an incompetent person — residence of the incompetent within section 2323, Code of Civil Procedure — an order made in the wrong district is irregular, not void.*

See MATTER OF PORTER ..... 147

— *City of New York — failure to file with the corporation counsel notice of an intention to bring an action against the city — what does not excuse or waive such failure.*

See KENNEDY v. THE MAYOR ..... 311

— *Leave to sue as a poor person — petition establishing a prima facie case — effect of a decision adverse to the plaintiff in a previous action for the same cause.*

See YOUNG v. NASSAU ELECTRIC R. R. Co ..... 126

— *Supplementary proceedings — order for the examination of a third party — the judgment debtor may require it to be filed, although it criminales the party obtaining it.*

See SINNOTT v. FIRST NATIONAL BANK ..... 161

— *Partition — an interlocutory judgment should provide for an apparent existing lien — the question as to who was the judgment debtor will not be determined on affidavits.*

See KELLY v. WERNER ..... 68

— *Action against tortfeasors — they are severally liable — a failure to serve one is not a ground for striking the case from the calendar.*

See RAPPAPORT v. WERNER ..... 525

— *The remedy to prevent names being put on ballots is by mandamus, not by order.*

See MATTER OF NOBLE ..... 55

— *In regard to the review of adjudications.*

See APPEAL.

— *As to allowance and recovery of costs.*

See COSTS.

— *Relating to injunctions.*

See INJUNCTION.

— *Relating to proceedings by mandamus.*

See MANDAMUS.

— *Relating to the granting of new trials.*

See NEW TRIAL.

— *Relating to the trial of actions.*

See TRIAL.

**PRESCRIPTION** — *Title by.*

See ADVERSE POSSESSION.

**PRESUMPTION:***See* EVIDENCE.

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**PRINCIPAL AND AGENT** — *Authority of the agent, from what implied.*]

The authority of the president of a corporation to bind the corporation by acts within the scope of his apparent authority may be implied from the adoption or recognition of his acts by the corporation or its directors or trustees. *HALL v. OCHS* ..... 108

— *Brokerage on a marriage contract — payment of the broker's fee by the wife with property procured from the husband — the latter may sue for its recovery.*

*See* PLACE *v.* CONKLIN. .... 191

— *Action against brokers to recover margins — examination of the defendants before trial to show that the transactions reported by them were fictitious.*

*See* LEACH *v.* HAIGHT. .... 522**PRINCIPAL AND SURETY** — *Subrogation of the latter, on paying the debt, to the creditor's rights in collateral.*]

1. Where a creditor, having a debt secured by certain warehouse certificates, the property of the debtor, and also by a bond and mortgage given by a third party, elects to enforce payment by a foreclosure of the bond and mortgage, the mortgagor is entitled to be subrogated in equity to the rights of the creditor in the warehouse certificates; and where the amount of the liability cannot be ascertained until a judicial accounting is had, a court of equity has full power to define the rights of the parties as to both classes of security and to control in the hands of the creditor the security to which the mortgagor may be entitled on a full judicial determination of the extent of his liability and the satisfaction of the amount found due.

A decree made on such an accounting should provide for the substitution of the mortgagor in the place of the creditor upon the ascertainment and payment of the amount of the liability. *STERNBACH v. FRIEDMAN* ..... 534

2. — *The creditor is bound to account for the collateral.*] A creditor who himself, or by his attorney acting within the scope of his authority, so deals with securities to which a surety may be entitled by way of subrogation as to lose, or destroy them, or create an opportunity for a third party to abstract them, is accountable for the value of the securities to the surety paying the debt, or whose property is resorted to for the purpose of securing payment thereof. *Id.*

— *Landlord and tenant — a surety on a lease not discharged by the lessee's death, nor by a failure to present the claim against his estate, nor by a change of occupation, nor by a violation of a covenant against subletting — authority of the president of a corporation to bind it — liability of a corporation upon a guaranty which, because of the identity of the names, is, on its face, the individual obligation of its president.*

*See* HALL *v.* OCHS ..... 108**PROCEDURE:***See* PRACTICE.**PROCESS** — *Service of summons by publication — when a second order therefor is properly obtained to protect the plaintiff.*]

1. An attorney for the plaintiff in an action, who has been notified by the defendants that they would move to vacate an order obtained for the service of the summons therein by publication on account of the alleged insufficiency of the affidavits upon which it was granted, may properly obtain a second order of publication with a view to protecting his client against the mischance of having the first order adjudged to be defective. *LITTLEJOHN v. LEFFINGWELL* ..... 185

2. — *Sufficiency of the order under section 440, Code of Civil Procedure.*] An order of publication which directs that "the plaintiff deposit in the post office at the city of Brooklyn a set of copies of the summons and complaint in this action, and of this order \* \* \* directed to the said defendants, Lucy A. Littlejohn Leffingwell and Elisha Dyer Littlejohn, at Cairo, Egypt," is a substantial compliance with the provisions of section 440 of the Code of Civil Procedure. *Id.*

3. — *Attempt to begin an action by mailing a summons to a sheriff which reaches him after his term has expired.*] The mailing of a summons on the

**PROCESS**— *Continued.*

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30th day of December, 1897, to the then sheriff of a county, which did not reach him until the 1st day of January, 1898, when his successor, although entitled to the office of sheriff, had not taken possession of the same or served upon the outgoing sheriff the certificate required by sections 182 and 183 of the Code of Civil Procedure, constitutes an attempt to commence an action, within the meaning of section 399 of the Code of Civil Procedure. *Id.*

4. — *The relation of the outgoing to the incoming sheriff.*] *Semble*, that the outgoing sheriff, while retaining possession of the office awaiting the advent of the new sheriff, is to be considered as his agent in receiving such process as comes into his hands until the transfer of the office is complete. *Id.*

**PROMISSORY NOTE:**

*See* **BILLS AND NOTES.**

**PROOF:**

*See* **EVIDENCE.**

**PROPERTY** — *Personal.*

*See* **PERSONAL PROPERTY.**

— *Real.*

*See* **REAL PROPERTY.**

**PUBLIC OFFICER:**

*See* **OFFICER.**

**PUBLIC STREET:**

*See* **MUNICIPAL CORPORATION**

**PUBLIC WORK** — *In a city.*

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**PUBLICATION** — *Service of process by.*

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— *Negligence — passenger injured in a collision in which a street railroad car is run into by a wagon — liability of the railroad company — when it is the duty of a railroad company to use the highest degree of care.*

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**REAL PROPERTY**—*Auction sale of real estate—signature of the terms of sale by the vendor before the sale, is a sufficient compliance with the Statute of Frauds.] 1. Where an auctioneer and a vendor of real property, just before the sale thereof at auction, sign the terms of sale with a poster attached thereto containing separate diagrams of the parcels to be sold, and the auctioneer reads them to the assembled buyers, and at the time of knocking down one of the parcels makes on such parcel, as laid out on the diagram then before him on the stand, a pencil memorandum of the amount bid and of the name of the purchaser, there is a sufficient compliance with the Statute of Frauds, and the fact that the terms of the sale were signed by the vendor before the sale does not impair its validity. HAGEDORN v. LANG.... 117*

2. — *Such memorandum is not the final instrument.] The memorandum to be subscribed by the party by whom a sale is to be made is not the final instrument, but only a paper containing the terms of the transferring instrument thereafter to be made. Id.*

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**RECEIVER** — *Appointed in supplementary proceedings — his rights as against an assignee of the debtor.* 1. Subdivision 4 of section 2469 of the Code of Civil Procedure, providing that that section does not affect the title of a purchaser in good faith, without notice and for a valuable consideration, or the payment of a debt in good faith and without notice, only applies to a purchase or payment made prior to the filing of the order appointing a receiver, and the title of the receiver to claims upon which the judgment debtor has brought suit is superior to that of an assignee of the judgment debtor under an assignment made subsequent to the filing of the order appointing the receiver. **FITZPATRICK v. MOSES**..... 242

2. — *His substitution in a pending litigation.*] *Semble*, that in such a case the granting of an order substituting the receiver as the party plaintiff, in place of the judgment debtor, rests in the discretion of the court, and that where the interest of the receiver is small, as compared with that of other parties interested in the litigation, or other facts appear, upon which the court can exercise a legal discretion and refuse the relief, an appellate court will not interfere with its decision. *Id.*

3. — *Rights of the attorney in such suit.*] If the order of substitution be granted it should provide for the protection of such rights as the attorney for

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the plaintiff may have, and such attorney should be permitted to actively continue in the litigation if he so elects, in order that he may care for his interests therein. *Id.*

— *Assignee*— *compromise agreement by the debtor with his creditors— appointment of the debtor as receiver of the assigned property to conduct business therein prior to the settlement of the assignee's claim for commissions.*

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**SALE**— *Contract therefor by correspondence— when a test is provided for, a previous offer of warranty is not enforceable— a condition of the sale must in any event be complied with.] 1. In a correspondence relating to the purchase of some machines, the vendor offered to accompany the sale with a warranty that the machines would do certain things, but the vendee refused to make the purchase until it had had a practical test of the working of the machines, and an arrangement was made by which the vendee, before pur-*

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chasing, was to have the opportunity of testing one of them for thirty days, and if, after such test, it was satisfied that the machine would operate as the vendor represented, then the purchase should be completed and the purchase price become at once due. If the machine did not so operate, the purchase was not to be completed and the machine was to be returned to the vendor, in whom the title was to remain during all the time of the test.

At the expiration of the thirty days the vendee ordered two more machines, not notifying the vendor that the machine tested was not satisfactory nor returning it.

*Held*, that this action on the part of the vendee amounted to an acceptance of the machine, and that then for the first time the purchase was complete;

That no warranty accompanied the sale thus made.

*Semble*, that, even if the contract should be construed as a sale with a warranty, the further specific provision that the machine should be returned if the property proved, upon a test of thirty days, not to be as represented, obligated the vendee to make such return as a condition of his right to enforce the warranty. *BIRCH v. KAVANAUGH KNITTING CO.* ..... 614

2. — *Statute of Frauds—delivery and acceptance of goods sold subject to their being satisfactory to the vendee—effect of their delivery by the consignor to a carrier not selected by the consignee.* Although merchandise of the value of more than fifty dollars is purchased upon the verbal understanding between the purchaser and a third party that it is to be sold to the third party, if it proves satisfactory to him, and is delivered by the purchaser in accordance with such understanding to a general carrier not designated nor selected by the third party, and is by the purchaser consigned to the third party by a bill of lading forwarded to him by the purchaser (the consignor), there is no sufficient delivery and acceptance of the goods, and the title thereto remains in the consignor until the merchandise has been inspected by the third party, who has, until such inspection, no leviable or attachable interest in the merchandise as against such consignor. *NUGENT v. BEAKES.* ..... 123

3. — *Contract for the erection and sale of a heating apparatus—what use by the vendee, after discovery of defects therein, constitutes an acceptance thereof.* A vendee in a contract for the erection in her dwelling house of a hot water heating apparatus, which was tested about Christmas, 1895, who, although she finds some fault with it, never repudiates the work or orders or suggests that the apparatus be removed, but continues to use it up to the time of the trial, on the 17th day of February, 1897, of an action brought to enforce payment of the value thereof, must be considered to have accepted the apparatus, and cannot interpose as a defense the existence of defects therein discovered early in the year 1896. *ELLISON v. CREED.* ..... 15

4. — *Counterclaim.* *Semble*, that the vendee might have set up, by way of counterclaim, any damages which she had sustained because of such defects. *Id.*

5. — *Contract of sale providing for a test to be made by a person named—agreement that the test should be made by another—proof of such agreement by the vendor under a complaint alleging performance.* A director of a corporation, by a contract, to which the corporation was not a party, agreed to pay for a stamping mill to be furnished to the corporation, in case the mill should prove satisfactory. The contract provided, "It is agreed that the test of the mill shall be made by E. P. Jones." Jones, who was an employee of the corporation at the time the contract was made, having been dismissed from its employ before the test was made, the test was, by agreement between the parties interested in the contract, made by one James Smith and pronounced satisfactory, but notwithstanding this the director refused to pay the purchase price.

In an action brought to recover from the director the purchase price of the mill,

*Held*, that the plaintiff was entitled to recover;

That the agreement that the test should be made by Jones did not impose a duty upon the vendor, but was a concession on his part to the vendee, upon whom the burden was imposed of having such test made; that it was not a condition precedent to be established as a part of his agreement by the

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vendor, and, hence, the fact that the plaintiff had alleged performance of the contract did not preclude him from showing that the vendee, who had undertaken this part of the contract, had failed in its performance, and that another person had been substituted for Mr. Jones to make the test.

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— *Debtor and creditor—the fact that a wife assists her husband in his business and speaks of the business as their business, etc., does not make her liable for goods sold for use in the business.*

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— *Payment—delivery by a vendee to his vendor of checks stated to be in full payment—retention of the checks by the vendor, who states that he will accept them upon account.*

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— *Advertising—to be paid for by certain deductions from the price of articles to be purchased—such provision is not applicable where the purchase is agreed to be for cash.*

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See *WOOLSEY v. SHAW* ..... 405

— *Damages recoverable by way of counterclaim because of defects in a heating apparatus in an action to recover the purchase price.*

See *ELLISON v. CREED* ..... 15

**SHERIFF**—*Attempt to bring an action by mailing a summons to a sheriff which reaches him after his term has expired—the relation of the outgoing to the incoming sheriff.*

See *LITTLEJOHN v. LEFFINGWELL* ..... 185

— *Conversion of chattels by a sheriff—proof as to its effect on the owner's customers and business—the price on an execution sale is some evidence of value.*

See *MONTIGNANI v. CRANDALL COMPANY* ..... 228

**SHIPPING**—*Marine insurance—unseaworthiness of the vessel at the commencement of the voyage—it does not preclude a recovery on a time policy.*

See *STARBUCK v. PHENIX INSURANCE CO.* ..... 293

**SOCIETY:**

See *ASSOCIATION.*

**SPECIFIC PERFORMANCE**—*Effect of the death of one of the grantors before the actual delivery of the deeds to the vendee.] Where, in an action for specific performance, both the deed originally tendered and a confirmatory deed are offered in evidence as muniments of title, and the trial court in the judgment decreeing specific performance does not direct the delivery of such confirmatory deed to the vendee, the fact that, pending an appeal to the Appellate Division, by whose judgment the delivery of the confirmatory deed is directed, one of the grantors named in and who executed both the deed originally tendered and the confirmatory deed dies, does not affect the validity of the deeds nor relieve the vendee from his obligation to complete his purchase.*

*FAILE v. CRAWFORD* ..... 278

**SPIRITUOUS LIQUOR:**

See *INTOXICATING LIQUOR.*

**STATUTE**—*Punctuation in the construction of statutes.] 1. The punctuation of a statute is entitled to slight weight in determining its construction, which depends upon what appears to be the intent of the language, taken as a whole, in view of the circumstances surrounding the passage of the act, and the evil which it was intended to remedy.* *TYRRELL v. THE MAYOR* ..... 334

2. — *Construction of.] The court will not so construe a statute as to bring it into conflict with the Constitution either of the State of New York or of the United States, in their provisions relating to the obligations of contracts.* *KOELESCH v. CITY OF NEW YORK* ..... 98

— *Constitutionality of.*

See *CONSTITUTIONAL LAW.*

**STATUTE OF FRAUDS**—*Auction sale of real estate—signature of the terms of sale by the vendor before the sale, is a sufficient compliance with the Statute of Frauds—such memorandum is not the final instrument.*

See HAGEDORN v. LANG. . . . . 117

—*Delivery and acceptance of goods of the value of more than fifty dollars sold under a verbal understanding, subject to their being satisfactory to the vendee—effect of their delivery by the consignor to a carrier not selected by the consignee.*

See NUGENT v. BEAKES. . . . . 128

**STAY**—*Undertaking on appeal given to stay proceedings on a portion only of the judgment appealed from—objection that it was ineffectual, and, therefore, without consideration, when untenable.*

See O'BEIRNE v. CARY. . . . . 328

**STOCK**—*In corporations.*  
See CORPORATION.

**STREET**—*In a city.*  
See MUNICIPAL CORPORATION.

**SUBROGATION**—*Of sureties.*  
See PRINCIPAL AND SURETY.

**SUBSCRIPTION**—*To stock of a corporation.*  
See CORPORATION.

**SUBSTITUTION**—*Of a new attorney.*  
See ATTORNEY AND CLIENT.  
—*Of a receiver in a pending action.*  
See RECEIVER.

**SUMMONS:**  
See PROCESS.

**SUNDAY**—*New York city—the commissioner of street cleaning may call out employees on Sunday—extra pay for work on Sundays for all such employees.*  
See TYRRELL v. THE MAYOR. . . . . 334

**SUPERVISOR**—*Of a county.*  
See COUNTY.

**SUPPLEMENTARY PROCEEDINGS:**  
See EXECUTION.

**SURETY:**  
See PRINCIPAL AND SURETY.

**SURROGATE**—*Application for leave to issue an execution against executors—the surrogate may require an intermediate accounting by the executors.]*  
1. On an application by a legatee to the surrogate for leave to issue execution under the provisions of sections 1825 and 1826 of the Code of Civil Procedure, on a judgment obtained against the executors of an estate, the surrogate has the power to require an intermediate accounting to determine the question as to the amount of assets in the hands of the executors where the executors allege that an accounting out of court has been had between them and the parties entitled to the estate, and that the estate has been duly distributed among the parties entitled thereto, and that at no time since the commencement of the action referred to in the petition have they been in possession of any assets of the estate.

MATTER OF CONGREGATIONAL UNITARIAN SOC. . . . . 387

2. —*Statute of Limitations.]* The fact that the Statute of Limitations has run against any application for an accounting for the purpose of compelling in that proceeding the executors to pay a legacy is not a bar to a proceeding for leave to issue execution on a judgment against the executors.  
*Id.*

**TAX**— *Medical society organized under chapter 94 of the Laws of 1813—it is not exempt from taxation under chapter 498 of the Laws of 1893.* A medical society, organized under chapter 94 of the Laws of 1813, entitled "An act to incorporate medical societies, for the purpose of regulating the practice of physic and surgery in this State," which maintains a medical library open to the public, and furnishes rooms for the meeting of medical or charitable societies—being, in effect, a medical club house where the members of the medical profession meet for "mental improvement," and such incidental benefits as flow from an association and co-operation of effort—and which alleges that it has "established, in the city of Brooklyn, an organization for mental improvement and for certain educational and charitable purposes," unaccompanied by any further allegation, and fails to allege that it is organized for the exclusive purpose of carrying out any of these objects, and makes no claim that the purpose of the society is to improve the morals of either men or women, or that it is for religious, missionary, hospital, patriotic, historical or cemetery purposes, is not entitled to exemption from the payment of taxes under the provisions of chapter 498 of the Laws of 1893.

PEOPLE EX REL. MEDICAL SOCIETY v. NEFF..... 83

— *Long Island City—chapter 141, Laws of 1896, relating to the tax on foreign insurance companies, is a "special city law"—it was not legally passed.*

See EXEMPT FIREMEN ASSN. v. TRUSTEES..... 138

— *Liquor Tax Law.*

See INTOXICATING LIQUOR.

**TAX LEASE**— *Vendor and purchaser—title originating in a tax lease, after the expiration of which the tenant has continued in possession—a title by adverse possession must rest on unassailable proof thereof.*

See VENDOR AND PURCHASER.

**TAXPAYER'S ACTION**— *Action by a taxpayer against village trustees who have made excessive appropriations—injury peculiar to him need not be shown.*

See MUNICIPAL CORPORATION.

**TENANCY**— *In its relation to tenure under a lease.*

See LANDLORD AND TENANT.

**TENEMENT HOUSE**— *Defect in the stairs—obligation of the landlord to light the halls and stairways.*

See NEGLIGENCE.

**TIME**— *Certificate of nomination for State Senator—when it may be filed under section 59 of the Election Law—distinguished from acts affecting the rights of third parties.*

See MATTER OF NORTON..... 79

— *Specification of the time in an indictment.*

See PEOPLE v. WILLIS..... 208

**TITLE**— *To real property.*

See REAL PROPERTY.

**TORT:**

See WRONG.

**TRIAL**— *A jury, after sealing a verdict and separating, may be directed to reconsider its form—they need not retire while doing so.] 1. The fact that a jury have signed and sealed their verdict and have separated before the opening of the court does not deprive the court of the right to send the jury back, when the verdict has been opened, to reconsider it; and where a verdict has been rendered for the plaintiff for a definite sum the court may direct the jury to alter it so as to be in form for the plaintiff on the first cause of action alleged in the complaint and for the defendant on the second cause of action, provided the jury finally agree to the verdict as thus altered.*

It is not necessary for the jury to retire for the purpose of considering the form of the verdict. LYON v. BROWN..... 328

2. — *Transfer by a client to her attorney—a court refusing to allow further evidence upon the question of consideration should not submit the ques-*

**TRIAL**—*Continued.*

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*tion of consideration to the jury.]* Where, in an action growing out of a transfer by a client to her attorney, the plaintiff, who claims under the attorney, is refused permission to give all the testimony he has at hand to show what the actual consideration was, the court stating that there was then sufficient in the testimony to entitle the plaintiff to claim that his cause of action must not fall for want of a consideration, it is improper for the court to charge the jury that it was necessary for the plaintiff to establish that there was a sufficient consideration and that they must be able to discover and say what that consideration was. *Id.*

3. — *Action against tort feors— they are severally liable—a failure to serve one is not a ground for striking the case from the calendar.]* An action against tort feors to recover damages for alleged wrongdoing, should not be stricken from the general calendar on the ground that one of the parties defendant has not been served with the summons, as in such case each defendant is severally, as well as jointly, liable, and the fact that one defendant is not served does not stay the action as against the others.

RAPPAPORT v. WERNER..... 525

4. — *Objection to testimony competent as to one of several defendants.]* Where an action is brought against two defendants having conflicting interests, an objection to a question tending to elicit a fact material as against one of them is not well taken. If the answer is incompetent and prejudicial to the other defendant, a motion to strike it out should be made and an exception taken to the denial thereof.

KEEGAN v. THIRD AVENUE R. R. Co..... 297

5. — *Amendment where an action is improperly brought against executors as such.]* Where an action is brought against such executors in their representative capacities the court has no power at the trial to convert the action into one against them individually. ZIMMER v. CHEW..... 504

— *Negligence— injury to a child necessitating amputation of one of its legs— where the trial court has not disclosed its real judgment a verdict for \$15,000 will not be set aside by the Appellate Division.*

See KALFUR v. BROADWAY F. & MET. AVE. R. R. Co..... 267

— *Venus laid in a county in which neither party resided— on defendant's motion to change to the county of his residence it should not be changed to that of the plaintiff.*

See LORETZ v. METROPOLITAN STREET R. Co. . . . . 1

— *Evidence— when the admission of letters between the parties not relating to the subject of the action requires a new trial.*

See HOAG v. WRIGHT ..... 260

— *Dismissal for a failure to prosecute— the judgment determines the right to an injunction pendente lite.*

See DE BERARD v. PRIAL..... 502

— *Malicious prosecution— the plaintiff must prove want of probable cause in addition to his innocence.*

See KUTNER v. FARGO.... 317

— *Effect of both parties moving for the direction of a verdict.*

See O'BEIRNE v. CARY..... 328

— *Conclusion of law considered as a finding of fact.*

See MUTUAL BENEFIT LOAN Co. v. JAEGER..... 90

— *What is not an excessive verdict.*

See MILLER v. ERIE R. R. Co..... 217

See NEW TRIAL.

**TRUST**— *The effect of depositing money with a trust company in the name of the depositor as trustee for another— when it does not create an irrevocable trust.]* 1. Where a father deposited his own money with a trust company in his name, as trustee for his daughter and his son, requiring them at the time to give to him powers of attorney authorizing him to control the fund, and the father treated the account at all times as his own, retaining the pass book in his own possession, and alone drawing checks upon the account,

**TRUST** — *Continued.*

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some of which were drawn to the order of the daughter without objection on her part, the father using the account without reference to, or consultation with, either of his children, the court considered that it was understood by all the parties that the father was the owner of the money, and that he never intended to, and never did, divest himself of the title thereto, and never made any irrevocable trust in respect thereof. *DEVLIN v. HINMAN*... 107

2. — *When an application to the court for instruction is not properly based on facts dehors the instrument.*] A trustee is bound to execute a trust as it is stated in the written agreement creating it; and where its terms are clear and precise, and there is no allegation that there are any conflicting claims made in respect thereto, he is not in a position to apply to the court for its direction as to his administration of the trust because of facts *dehors* the instrument of trust, which have come into existence since its execution. *CRAWFORD v. WINSTON*..... 457

— *Will — when the surplus income of a trust fund passes under the residuary clause.*

*See SEIBERT v. MILLER*..... 602

**UNDERTAKING** — *On appeal.*

*See APPEAL.*

— *Other than on appeal.*

*See BOND.*

**UNDUE INFLUENCE**

*See DURESS.*

*See FRAUD.*

**VENDOR AND PURCHASER** — *Contract to sell land — liability of one of several contract vendors who persuades some of her co-vendors not to execute a deed.*] 1. The fact that one of several owners of real estate who have contracted to sell their interest in the premises, has afterwards influenced some of the owners to refuse to execute a deed thereof in pursuance of a written contract executed by their attorney and agent on their behalf, in reliance upon which contract the purchasers have employed counsel to search the title, and have arranged for a loan to be made to them upon said premises, does not create a cause of action against her for damages, no fraudulent representations or conspiracy being alleged. *DALY v. CORNWELL*..... 27

2. — *Complaint in an action to enforce it.*] It seems, that even if the moral obligation of such vendor to abstain from interference with the execution of the contract were not one of those imperfect obligations which the law does not undertake to enforce, a complaint based thereon would be defective where it did not allege that such vendor induced all the other parties interested not to execute the deed of the premises, as in such case *non constat* but that some of the other owners, to whom such vendor had not presented persuasion or inducement, might refuse to execute the conveyance, and thus have prevented the consummation of the sale. *Id.*

3. — *Title originating in a tax lease, after the expiration of which the tenant has continued in possession — a title by adverse possession must rest on unassailable proof thereof.*] A title originating in a tax lease for a term of thirty-five years, expiring in 1857 (the tenant under which and his devisees and successors, after the expiration of the term of the lease, continue in possession of the premises), is not a marketable title which a purchaser, under a contract executed in 1894, will be required to accept, unless it is demonstrated to a reasonable degree of certainty that the parol evidence in support of a title by adverse possession cannot be contradicted. *RUESS v. EWEN*.... 484

— *Auction sale of real estate — signature of the terms of sale by the vendor before the sale, is a sufficient compliance with the Statute of Frauds — such memorandum is not the final instrument.*

*See HAGEDORN v. LANG*..... 117

— *Judicial sale — objections to the title — a variation of one-half inch in 141 feet — encroachment of buildings upon adjoining land and on the street.*

*See MERGES v. RINGLER*..... 415

**VENDOR AND PURCHASER** — *Continued.*

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— *Specific performance* — effect of the death of one of the grantors before the actual delivery of the deeds to the vendee.

See FAILE v. CRAWFORD..... 278

— When an easement in, and not the fee of, a street is conveyed — it may be acquired by eminent domain.

See RAY v. NEW YORK BAY EXTENSION R. R. Co..... 8

— Who is not a bona fide purchaser.

See KELLY v. WERNER..... 68

**VENUE** — Laid in a county in which neither party resided — on defendant's motion to change to the county of his residence it should not be changed to that of the plaintiff.] On a motion by a defendant to change to the county in which he resides the venue of an action which has been laid in a county in which neither of the parties thereto resides, it is improper for the court to make an order, against the objection of the defendant's counsel, changing the place of trial to the county of the plaintiff's residence.

LORETZ v. METROPOLITAN STREET R. Co..... 1

**VERDICT** — *Of a jury.*

See TRIAL.

**VESSEL:**

See SHIPPING.

**VETERAN** — *Discharge of.*

See CIVIL SERVICE.

**VILLAGE:**

See MUNICIPAL CORPORATION.

**WAGES:**

See SERVICES.

**WAIVER** — *Pledge of a life insurance policy* — waiver by the pledgee of his right to dispose of it without notice — consideration for the waiver — damages recoverable where the policy is surrendered.

See TOPPLITZ v. BAUER..... 526

— City of New York — failure to file with the corporation counsel notice of an intention to bring an action against the city — what does not excuse or waive such failure.

See KENNEDY v. THE MAYOR..... 811

— Ejectment — waiver by a tenant at will of his right to the statutory notice to quit.

See WISSEL v. OTT..... 159

**WAREHOUSEMAN** — *Bailment* — loss of goods by fire — false representations as to the fireproof character of warehouse buildings.

See DIETZ v. YETTER..... 458

**WARRANTY** — *In an insurance policy.*

See INSURANCE.

— On sales of personal property.

See SALE.

**WILL** — *Testimony as to statements of the decedent in avoidance of its legal effect.*] 1. Where a testator, after giving to his widow, in lieu of dower, a life estate in three lots, devises the estate in remainder in one of the lots (the title to which stands in the name of his wife) to his son, by a provision concluding with the words, "which said strip or parcel it is understood my said wife will convey and transfer to my said son," it is not proper to avoid the effect of the will by allowing one of the subscribing witnesses to it and the counsel who drew the instrument to testify that, at the time of its execution, it was agreed by the testator and his wife that the direction of the will to convey to the son should be discretionary and not obligatory. SHANLEY v. SHANLEY. 172

2. — *Election by a life tenant as to conveying her own land devised by the will.*] The fact that the widow takes possession of the land devised to her

**WILL**—*Continued.*

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for life, and of certain personal property specifically bequeathed to her, while she refuses to convey the lot, the title to which stands in her name, does not constitute an election on her part, as in so doing she as much disclaimed the will as adopted it—the case being distinguishable in principle from one in which a widow accepts provisions of a will in lieu of dower, or one in which a person accepts a devise, subject to the payment of a legacy, as the widow would not, in a case like the present one, be divested of her land by mere estoppel, affirmative action in a court of equity being necessary to compel her to part with her title to it. *Id.*

3. — *Effect of non-compliance with the will.*] *Semble*, that where a beneficiary refuses to comply with the demands of a will, and thus renders its provisions in his favor liable to forfeiture, the forfeiture is not total, but that only so much of the gift is forfeited as is necessary to make compensation to the person, the provisions of the will in favor of whom the beneficiary has declined to carry out. *Id.*

4. — *An absolute power of sale is not limited by the suggestion of a time for its exercise.*] Where an absolute power of sale is conferred upon an executor, the addition of words suggesting a time for its exercise or indicating the testator's desire in that regard do not restrain or limit the action of the executor. *CHANLER v. NEW YORK ELEVATED R. R. Co.* . . . . . 305

5. — *Effect of the time of its exercise not being limited by lives.*] The fact that an executor may require, in order to make a sale under such a power, a period of time not measured by lives in being, does not suspend the power of alienation; and, in such a case, a trust to receive the rents and profits pending the sale for the benefit of beneficiaries is not illegal. *Id.*

6. — *Exercise of a power of sale postponed for the convenience of the estate—legacies vested, although not bequeathed by direct gift.*] Where the postponement of the distribution of an estate is for the convenience of the estate to enable the executors advantageously to convert the property, and the rents, income and profits accruing between the time of the testator's death and the time of distribution are given to the several legatees, to be paid semi annually, in proportion to their interests in the *corpus* of the fund, the presumption against the vesting of the legacies arising from the fact that there is no direct gift, but only a direction to pay over at a future time, is rebutted.

Under the provisions of a will by which separate funds are created out of the proceeds of sale of the real estate left by the testator and are directed to be set apart and held for the benefit of certain persons who are respectively to receive the income from the respective funds until the time of actual distribution, the title to the fund set apart for any beneficiary vests at once. *Id.*

7. — *When the surplus income of a trust fund passes under the residuary clause.*] Where a will which contains a residuary clause, providing that "All the rest, residue and remainder of the proceeds of my residuary estate and property, including all lapsed legacies and property not herein effectually given, devised or bequeathed, I give, devise and bequeath to the said Ottilie Orphan Asylum," creates a trust fund, out of the income of which the executors are directed to pay to the widow of the testator the sum of \$5,000 a year, in lieu of her dower interest, but makes no provision for the disposition of the surplus income accruing during the lifetime of the widow, the bequests to the other beneficiaries in the will being limited to specific sums, such surplus passes under the residuary clause to the residuary legatee. *SEIBERT v. MILLER.* . . . . . 602

— *Contract—agreement to make compensation for services by will—evidence establishing a right to such compensation.*

See *MATTER OF WESCOTT.* . . . . . 239

— *Effect of a testator's leaving part of his estate in the business of a firm.*

See *ZIMMER v. CHEW.* . . . . . 504

**WITNESS**—*Examination of witnesses in relation to newspaper articles.*] 1. It is not proper for counsel to read to a witness on cross-examination an article printed in a newspaper and ask him, "Is that statement substantially a correct statement of the fact?" when it is apparent that most of the facts stated in the article were not within the knowledge of the witness and could

**WITNESS** — *Continued.*

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not, therefore, be either denied or admitted, especially where the direct examination of the witness had not been directed to any of the facts contained in this newspaper article.

On the direct examination of a witness it is improper to produce a newspaper article and ask him (reading from the article), "Do you remember seeing that in the public print on July 25, 1893?" and whether he had had interviews with various reporters and had made statements to them in connection with the case. *SCHATTMAN v. AM. CREDIT INDEMNITY CO.*..... 392

2. — *Privilege of an attorney.*] So far as an attorney is called upon simply to prove the execution and delivery of an instrument by his client or the contents of that instrument, knowledge of which he had procured by reading it, and not through any communication from his client to him, his testimony does not come within the privilege conferred by section 885 of the Code of Civil Procedure. Neither the fact of the existence of such instrument, nor its delivery by the client, are communications made by the latter to the attorney. *Id.*

— *A commissioner appointed by the court of a foreign State has no power to commit a recalcitrant witness to jail in the State of New York — power of the Legislature.*

See *PEOPLE EX REL. MACDONALD v. LEUBISCHER*..... 577

— *Evidence — a determination of police commissioners is not a "contradiction" under section 882 of the Code of Civil Procedure, and section 714 of the Penal Code, which may be proved in order to affect the credibility of a witness.*

See *PEOPLE v. SULLIVAN*..... 544

— *Police officer — proceedings for his removal — effect of a failure of the record to show that witnesses were sworn.*

See *PEOPLE EX REL. BALLARD v. MOSS*..... 475

— *Railroad — expert evidence as to the effect of the use of paint upon a push stick.*

See *MILLER v. ERIE R. R. CO.*..... 217

— *Proof by interested witnesses — presumption of negligence not overcome by.*

See *O'FLAHERTY v. NASSAU ELECTRIC R. R. CO.*..... 74

**WRONG** — *Action against tortfeasors — they are severally liable — a failure to serve one is not a ground for striking the case from the calendar.*

See *RAPPAFORT v. WERNER*..... 525

— *Contract to sell land — liability of one of several contract vendors who persuades some of her co-vendors not to execute a deed.*

See *DALY v. CORNWELL*..... 27





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